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A MANUAL OF CIVIL LAW.

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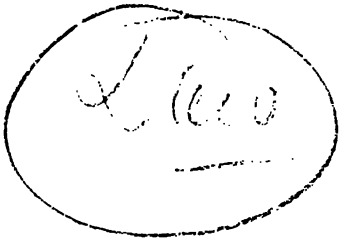

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MANUAL

OF

CIVIL LAW.

LONDON:
A. and G. A. SPOTTISWOODE,
New-street-Square.

MANUAL

OF

CIVIL LAW,

FOR THE USE OF SCHOOLS,

AND MORE ESPECIALLY OF

CANDIDATES FOR THE CIVIL SERVICE,

CONSISTING OF

AN EPITOME IN ENGLISH

OF THE

INSTITUTES OF JUSTINIAN,

CAREFULLY EXPURGATED

WITH AN INTRODUCTORY CHAPTER.

BY E. R. HUMPHREYS, LL.D.,

HEAD MASTER OF CHELTENHAM GRAMMAR SCHOOL.

LONDON:

LONGMAN, BROWN, GREEN, AND LONGMANS.

1854.

BIBLIOTHECA·BODLEIANA

TO

THE RIGHT HONOURABLE

LORD JOHN RUSSELL,

LORD PRESIDENT OF H.M. PRIVY COUNCIL,

This little Work,

THE FIRST OF A SERIES COMPOSED

CHIEFLY FOR THE USE OF CANDIDATES FOR THE CIVIL SERVICE,

IS, WITH HIS LORDSHIP'S PERMISSION, INSCRIBED BY

HIS OBEDIENT AND OBLIGED SERVANT,

THE AUTHOR.

PREFATORY NOTE.

THIS little work was originally compiled to meet a want severely felt by the Author in the Instruction of his own pupils. About two years since he had become convinced that a time had arrived when the CIVIL LAW, with the elements of POLITICAL ECONOMY, as well as the PRACTICAL APPLICATIONS OF SCIENCE, ought to form branches of the Education given in our great Public Schools. With regard to the first, however, it was evident that to place the Institutes of Justinian in their original form in the hands of the young, would not only be injudicious, but might be positively injurious. The Author therefore drew up the Compilation, which is now, at the request of others, given to the Public, and which may, he trusts, obviate a difficulty that has been experienced by many other Educators besides himself. Such a work can lay no claim to originality, nor to any title beyond that of a faithful Epitome of the original: that it may, however, merit this title,

no care has been spared. In addition to various other works alluded to in the Introductory Chapter, the Author desires to acknowledge the assistance he has derived from the Edition of the Institutes of Justinian edited by Mr. Cumin, of Balliol College, Oxford, a work that well deserves a place in the Library of every Law-Student.

Cheltenham, Sept. 29th, 1854.

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CIVIL LAW.

INTRODUCTION.

THE interest which leads us to consider the study of the Civil Law a necessary department of a liberal education is, in some respects, of a similar nature to that which recommends to our attention the history of the Church, and an acquaintance with the principles of anatomy and medicine. In any civilised state of society, where the community are governed by laws, a knowledge of the principles of justice upon which those laws are founded must be important to every educated citizen, who considers himself entitled to their protection, and amenable to their restrictions in the ordinary routine of social life. This interest presents itself to us in several different points of view: the Civil Law is the foundation of the jurisprudence of all modern European nations; it constitutes, together with the old feudal law, the basis of the Common Law of England: of the law of Scotland it forms a still larger ingredient; and of the practice of our Courts of Chancery, which adjudicate

questions of a nature that could not have arisen under the feudal law, it may be regarded principally, if not exclusively, as the foundation and precedent. It is also a monument of the wisdom and justice of the most powerful nation of antiquity, neither less worthy of attention, nor less pervading in its influences, than the reliques of their Fine Arts; and it is of peculiar importance to the classical scholar, as being necessary to illustrate the meaning of many passages, more particularly in the Latin authors, where the allusions to legal questions and usages, and the instances of legal phraseology are far more numerous than may be generally supposed by students unacquainted with the Roman laws. We must perceive that this is necessarily the case, from the circumstance that among the Romans, during the most flourishing periods of the Republic and the Empire, the knowledge of the law was not confined, as it is among us and other modern nations, to the members of any particular profession: it was an indispensable part of the acquirements and accomplishments of every citizen of rank, fortune, and education,—resulting originally from the peculiar relation between patron and client,— that he should attain to such a knowledge of the laws as might enable him to act as an advocate; and this laborious duty was performed for several ages without any other compensation than the celebrity and influence attendant upon success. Even the Roman Poets— notwithstanding the natural antipathy that may be supposed to exist between poetry and law — make

many allusions to law, and were frequently, particularly in the case of Ovid, distinguished for their legal learning: in every Roman author, in fact, many passages occur, which would be unintelligible if we had not the Roman laws to guide us to their meaning, and of which many persons, unacquainted with those laws, entertain very erroneous ideas.

It must appear to us an additional inducement to this study that even some passages of Scripture, in the writings of St. Paul especially, admit of satisfactory illustration from the same source.

If the knowledge of this subject be so useful and interesting to the general scholar, it must be a still more important and valuable acquisition to all who intend to prepare themselves for the legal profession; because the Roman Law, even though its provisions and enactments may not have the direct "force of law" in our courts, contains what may be regarded as the history and antiquities of the science.

It is not merely for the lawyer, however, that this knowledge has a practical and professional interest; for it happens that the Ecclesiastical Law, with which all clergymen are presumed to be acquainted, and with which the dignitaries of the Church, in the discharge of their important functions as judges and legislators, cannot dispense, is, more directly and immediately than any other portion of our legal system, founded upon the Civil Law.

The sources from which the *Corpus Juris Civilis* is deduced, may be thus enumerated: the *Leges Regiæ;* the *Plebiscita;* the Twelve Tables; the Re-

sponsa Prudentum; the *Edicta;* the *Senatusconsulta;* the Constitutions; the Theodosian Code; the Pandects, Institutes, and Novels of Justinian; and the *Basilicæ;* of the history and chronology of all which it will be necessary to take a concise view.

The *Leges Regiæ* were those enactments which originated with the Roman Kings, and were enacted or passed in the *Comitia Curiata,* the original public assembly, and, after the reform introduced by Servius Tullius, in the *Comitia Centuriata.* Between these two assemblies the difference was simply this; that none could act as members of the *Curiata* who were not also members of the patrician *gentes,* which were subdivisions of the *Curiæ,* and enjoyed a monopoly of all political power, reserving to themselves the exclusive privileges of making laws and holding magistracies, and keeping themselves isolated from the *plebs* by forbidding intermarriage: these privileges are known as the *jus suffragii, jus honorum,* and *jus connubii.* The *plebs,* on the contrary, enjoyed only those rights which were common to both orders, those of holding and purchasing all property, except the *ager publicus* (lands annexed by conquest); and these common privileges, called the *jura manûs et commercii,* constituted the *jus Quiritium.* It will appear from this, that the necessary qualification for the *Comitia Curiata* was birth; for which Servius Tullius substituted a property qualification, entitling all who possessed it to seats in a newly constructed council, called, from the system of election or representation adopted by him, the *Comitia Centuriata.*

The *Plebiscita* were the laws passed in the *Comitia Tributa*, an assembly established in A. U. C. 283, and for which the sole qualification was residence in a certain district. From these *Comitia* the patricians were altogether excluded, and the laws emanating from them were considered binding upon the plebs only, until, by the enactment of the *lex Hortensia*, in A. U. C. 286, they were received as obligatory upon the whole community.

It appears, then, that while the Senate was exclusively aristocratic, like our House of Lords, the *comitia* resembled our House of Commons; the names *Curiata*, *Centuriata* and *Tributa*, indicating the successive changes in its constitution: the first, implying that the members were qualified by birth only; the second by property; and the third—as the democratic element in the state prevailed—signifying that residence was the only qualification. The laws passed in the two first have not been recorded with any certainty, and were most probably borrowed from the neighbouring nations.

The *Senatusconsulta* and *Decreta*, which at first consisted merely of orders issued to military commanders and other public officers, and ordinances intended to meet particular exigencies, and were rather of an administrative than a legislative character, began to be regarded as laws toward the close of the Republican era; and, during the early ages of the Empire, as long as the senate retained any influence, made large additions to the rapidly increasing body of Roman law.

Of the Twelve Tables, which exhibited the first

attempt on the part of the Romans to construct a regular system of national and impartial laws, it is necessary to treat more fully. In the year of the city 292, C. Terentillus, a tribune of the *plebs*, propounded a law for defining the powers of the consuls, which was as strenuously opposed by the patricians as it was advocated by the democratic party. The contest on the subject of this *lex Terentilla* having continued for eight years with considerable excitement, it was at last resolved, *Hermodoro auctore*, at the suggestion of Hermodorus, an Ephesian refugee then residing in Rome, that measures should be adopted for preparing a code of written laws; and, accordingly, three commissioners were sent to Athens, to obtain information respecting the laws of Solon and other Greek legislators; and on their return the decemviri, appointed for the purpose, with the assistance of Hermodorus, prepared a digest of the laws and forensic usages theretofore existing among the Romans, modified and improved by the addition of everything worthy of adoption or suited to the circumstances, in the foreign laws which are believed to have been collected not only in the cities of Greece, but also among the Greek towns of Southern Italy. The services of Hermodorus were rewarded by a statue erected in the Comitium. To this account of the Twelve Tables objections have been made by some distinguished authors. Professor Vico of Naples first called in question the truth of the account given by Livy and Dionysius of Halicarnassus; and his example has been followed by many others, including the historian Gibbon.

objections are, that the appointment of the

commission is nowhere directly mentioned by Cicero; and that, from whatever sources the Twelve Tables may have been compiled, they could not have survived the destruction of Rome by the Gauls. To this it may be replied, that Cicero may not have had occasion to make any direct allusion to the commission; that it is everywhere alluded to as a generally recognised fact by the Roman writers; and that, although the statements of Livy and Dionysius relating to certain occurrences have been impugned, those statements refer to the very early periods of Roman history, which, like the earliest periods of all other histories, are confessedly legendary and fabulous. It may be said, therefore, that, both sides of the question being impartially considered, the fact of the commission may be regarded as established upon very sufficient evidence. Again, even granting that the Twelve Tables perished in the general ruin of the city, it would be absurd to suppose that, of the numbers of intelligent men who had made those laws their study, there were not several who could transcribe them correctly.

The matters of which the laws of the Twelve Tables treated were: the rights, privileges, and exemptions of Roman citizens; the power of creditors over debtors; trials involving rank, liberty, and life; the regulations of inheritances, guardianships, and ownership; penalties for various offences; the rates of money, with some sumptuary and other enactments; and all these ordinances were regarded as the basis

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of Roman jurisprudence until the compilation of the Theodosian Code.

The *Responsa Prudentum* (otherwise called *jus receptum*, or *receptæ sententiæ*) were the opinions or interpretations of men learned in the law (*juris prudentes*), illustrating the laws of the Twelve Tables. These interpretations, like the reports and precedents quoted in our courts, came to be regarded, in course of time, as portions of the law. This practice of giving legal advice is said to have originated with T. Coruncanius, the first plebeian Pontifex Maximus (A. U. C. 470); and became general in a short time. (See Horace, Epist. 2. 1. 103.)

Edicta were the proclamations issued at the commencements of their several years of office by the prætors and curule ædiles, and informing the public of the principles upon which they intended to administer justice; and may, therefore, be regarded as so many additions to and modifications of the laws, which the increase and mixture of the population rendered necessary. The city prætor (*urbanus*) administered justice, with the assistance of a jury (*judices*), between citizens exclusively; and the foreign prætor (*peregrinus*), first elected on the acquisition of a foreign province (*Sicily*), sat to adjudicate upon all questions arising between foreigners, and between foreigners and citizens, and founded his decisions, not so much upon Roman law, as upon the *jus gentium*. This new element in Roman jurisprudence, known by the name *jus honorarium*, *i. e.* the law of the magistrates, eventually obtained

so much authority, that it superseded in general estimation even the laws of the Twelve Tables. It happened, however, that as every successive prætor considered himself at liberty to take an arbitrary course, and make regulations for himself, the edict of one was frequently altered very considerably, or altogether set aside, by that of another; and, accordingly, we find that, in the reign of Hadrian, Salvius Julianus was commissioned by the emperor to draw up an edict which was to remain permanently in force, and to be the guide of all succeeding prætors. This was called the *Edictum perpetuum.* When a portion of a former edict was continued in the succeeding year, it was called *Edictum tralatitium;* and, when the edict was altogether new, *Edictum novum.*

The *Constitutions,* which were, in some degree analogous to the *Edicta,* consisted of the proclamations and ordinances which were published by the several emperors under the various titles of *Decreta, Edicta, Rescripta,* &c. These Constitutions, from the reign of Hadrian to that of Constantine the Great, were collected and arranged by Gregorius (or Gregorianus) A. D. 306, and subsequently, with some additions by Hermozenes (or Hermozenianus) A. D. 365; and these collections, though not actually and formally recognised by any legislative sanction, appear to have been regarded as works of considerable authority.

The *Theodosian Code,* which appears to have been suggested by the collections of Gregorius and Hermogenes, occupies a very important position

in the history of Roman jurisprudence. The vast accumulation of laws and commentaries, of various degrees of authority, had attained such a magnitude, that a methodical collection and digest became a matter of necessity; and Theodosius the Second, the grandson of Theodosius the Great, appointed a commission of eight men skilled in the law, under the direction of Antiochus, to compile a code which should embody all the Constitutions of the emperors from Constantine to that date, extending over a period of 126 years. The commission sat for nine years, and the result of their labours was publicly sanctioned and invested with the authority of law, in March A. D. 438.

It may be mentioned that Theodosius was Emperor of the East only, having placed his cousin and son-in-law, Valentinian, on the throne of the West; and that a document is still in existence, giving an account of the reception and sanction of the Code by the Roman Senate, when presented to them by the consul Anicius Acilius Glabrio Faustus.

In A. D. 506, an abridgment of the Theodosian Code, generally known as the *Ariani Breviarium*, was prepared under the superintendence of Count Goiaric, by order of Alaric, king of the Visigoths, for the use of his Roman subjects in Spain and Gaul. This abridgment, the several copies of which seem to have been attested by the signature of Arianus, who held some confidential appointment under the king, was illustrated by a commentary, and is the principal source from which succeeding authors

have derived any knowlêdge from the Theodosian Code. It has been frequently republished, with various additions and comments, in later times: sc. by Sichardus at Basle, in 1528; by Du Tillet at Paris, in 1550; by Cujacius, with the addition of some Novels, at Lyons, in 1566; by Godefroy of Geneva, its principal expounder, and continued by Professor Marville, in 1665; by Professor Ritter, with a commentary, at Leipzig, in 1745; and all these, together with some mutilated portions of the Theodosian Code and some Novels, discovered by Professor Peyron in the Library of Turin, and by Professor Clossius at Milan, were methodised and republished by Professor Wenck, at Leipzig, in 1825.

The *Justinian Code* was a digest of all the preceding codes and constitutions, prepared by the commissioners, who were invested with a discretionary power, under the superintendence of Tribonian, to revise and epitomise their materials according to their judgment. This task, which was undertaken in A. D. 528, was completed in the April of the following year, and was declared by an imperial sanction to supersede all previous codes and collections whatever. Immediately after the completion of this work, Tribonian was again employed, at the head of a commission of sixteen jurists, to execute another, involving considerably more skill and labour. This was the preparation of a digest of legal science, not from the constitutions or edicts, but from the commentaries of celebrated lawyers, such as Sabinus,

who lived in the time of Augustus; Caius, who lived in the reigns of Hadrian and the Antonini; Papinian, who lived under Septimius Severus; and his pupils, Paulus, Ulpianus, and Modestinus. In the short space of three years, this work was completed in 50 books, notwithstanding the difficulties occasioned by diversities of opinion among the old jurists, which it was found necessary for the emperor to reconcile and decide by the promulgation of his *quinquaginta decisiones*. And in 533 it was published under the name of the *Digesta* or *Pandecta*, and so sanctioned as to have the force of law.

Justinian, however, considering his great work of codification still incomplete, commissioned Tribonian, Theophilus of Constantinople, and Dorotheus of Berytus (*Beirout*) to draw up an elementary work from the Code and Pandects, for the more convenient use of law students, which is now known as the Institutes. He also employed Tribonian with four others to revise the first Code (that of 530), and incorporate with it the *fifty decisions*; and this revised edition, published and sanctioned in 534, under the name of the *Codex repetitæ prælectionis*, is the only form in which the Code has come down to our time. In addition to all these, Justinian published, in the course of the succeeding ten years, not less than 165 *Novellæ Constitutiones*, which were principally written in Greek, and are now generally known as the Novels of Justinian.

Both the Code and the Pandects of Justinian were subsequently translated into Greek; the former by

Theophilus, probably the same lawyer who was employed in its compilation by the emperor; and the latter by Stephanus of Constantinople, who is also believed to have been a member of the original commission.

The *Basilicæ* (*Constitutiones*) was a digest, undertaken in A. D. 867, by the Emperor Basilius the Macedonian, with a view to supply the inhabitants of the Eastern Empire, whose vernacular language was Greek, with a new and intelligible manual of the laws by which they were governed. Basilius, however, did not live to witness the completion of the work, which was eventually published, shortly after his accession in 886, by his son Leo the Philosopher. Of this digest, which was recognised as law only in the Eastern Empire, several translations and editions have been published in later times; the most remarkable of which are those of Cujacius, edited by Labbé, at Paris, in 1609; of Talrot, at Paris, in 1647; of Dr. Heimbach of Jena, at Leipzig, in 1833.

After the era of Basilius, several abridgments and commentaries were drawn up by eminent lawyers in the Greek language; of which the principal were, a *Synopsis Basilicorum* (ἐκλογὴ τῶν νόμων), undertaken by the immediate successors of Basilius; another abridgment by Psellus, who had been one of the preceptors of the Emperor Michael Ducas, and consisting of 1400 lines of a species of barbarous verse, of which it is impossible to determine whether the metre was intended to be Iambic or Trochaic; and a

third manual (*πρόχειρον νόμων*), drawn up, in 1345, by Constantine Harmenopulus of Thessalonica.

It was for a long time a popular belief among those who professed any knowledge of the history of ancient jurisprudence, that during the interval of intellectual darkness which hung over Western Europe after the dissolution of the Roman Empire, all vestiges of the Roman law lay buried, together with all the other reliques of learning, under the ruins of civilisation, and that it was merely by an accident that they were exhumed. The general impression was, that after all books on the subject of Roman law were supposed to have been lost and destroyed irrecoverably, a copy of the Pandects unexpectedly came to light in the town of Amalfi, in 1127, on the occasion of its capture by the Emperor Lotharius, during his campaign against Rodger, King of the Sicilies; but this statement, after a long and obstinate controversy between several eminent German and Italian lawyers, was at length found to have originated with a writer of the 14th century, and to be altogether unsupported by any historical evidence.

Although it is a matter of frequent complaint among the present admirers of the Civil Law, that its study is neglected by English lawyers in favour of more directly useful and practical subjects, it appears to have been cultivated with the most laudable zeal, at a very early period, by our more classical ancestors. Lectures were delivered upon the Roman laws, in the University of Oxford, during the reign

of Stephen, by Vacarius, an Italian lawyer, who was patronised by Theobald, Archbishop of Canterbury, and who published, for the use of his pupils, a manual of the Code and Pandects of Justinian in nine books, of which some copies are still in existence in the libraries of foreign universities, and have furnished Professor Wenck with the materials of an edition. A treatise also on the laws and customs of England, the oldest English law book extant, generally ascribed to Chief Justice Glanville of the time of Henry the Second, is largely indebted to the same ancient source.

In Scotland, where this treatise was very extensively adopted under the title of the *Regiam Majestatem*,—such being the first words of its exordium,—the Civil Law forms a still more important element in the national jurisprudence. This might have been naturally anticipated from the invariable practice of the Scottish law students to receive their professional education in the Universities of France and Holland, where the Civil Law has always been regarded as an indispensable department of study — a practice which continued to the beginning of the 18th century, when a Chair of Civil Law was established in Edinburgh,—and has not, even to this day, been altogether abandoned. Of the influence of the Civil Law upon the practice of the Scottish courts, one remarkable instance may be noticed here. It has been ruled by some of their highest judicial authorities, that the conventional nonobservance or desuetude of a law or statute may be considered

equivalent to its formal repeal, and that, after a certain interval of such desuetude,—sixty years, according to some authorities, while others say 100, —the law or statute in question may not be revived. This usage is in strict accordance with the words of the Institutes, which allow a law to be abrogated *tacito consensu populi.* The law of England, however, regards every enactment, no matter how obsolete, as in full force (*in viridi observantiâ*) until it is formally set aside by an act of the legislature. The study of the Civil Law, in connection with philology, which is, above all other collateral sciences, capable of supplying the clearest illustrations of its meaning and tendencies, has been for some centuries engaging the attention and the labours of the professors of foreign universities; nowhere, however, more zealously or indefatigably than in Germany; and is just now beginning to attract the notice of the learned among ourselves. Requiring, as it does, an intimate acquaintance with ancient classical literature, it cannot fail to be regarded at least as an accomplishment; and, it may be also observed, *quando tempus admonuit,* that, if the Pandects and Institutes had been more known and read in the black-letter age of law-making, the Latin of those venerable compositions might have been considerably improved. And, although some of the subjects of Roman legislation, such as the *patria potestas,* civil relationship (*agnatio*), and the social and political position of slaves and freedmen, are matters in which we, in our times and circumstances,

cannot feel any immediate or personal interest, — involving as they do relationships unknown to our present state of society, — there still remains the interest, not less lively or attractive, which must ever be awakened by instructive opportunities of contrast and comparison.

QUESTIONS.

Mention some of the inducements which should lead educated persons to the study of the Civil Law.

What peculiar interest has it for the classical scholar?

How was the profession of the law estimated among the Romans?

In what way do you suppose that a knowledge of the Civil Law must be useful to a clergyman?

What differences originally existed between the political privileges of the patricians and those of the plebs?

What privileges were common to both orders?

How did the *Comitia Curiata*, *Centuriata*, and *Tributa* differ from each other?

From what sources has the *Corpus Juris Civilis* been derived?

What were the *Leges Regiæ?*

What were the *Plebiscita*, and what peculiarity was there in their operation?

What were the *Senatûsconsulta?*

What difference did the change of the constitution of Rome produce in the legislative functions of the senate?

From what materials do you think it most probable that the laws of the XII. Tables were drawn up?

What circumstances rendered the preparation of this body of laws necessary?

By what individual is it believed that the measure was suggested?

Why has the fact of the introduction of foreign laws been doubted?

How would you reply to those doubts?

What were the *Responsa Prudentum?*

By whom is it supposed that the custom of giving legal advice was first introduced?

What do you mean by *Edicta?*

Who were the *prætores urbani* and *peregrini?* When, and for what purposes, were they first elected?

What do you mean by the terms *jus honorarium* and *edictum perpetuum?*

What were the Constitutions?

When was the Theodosian Code drawn up, and by whom?

Of what materials was it composed?

Who were Gregorius and Hermozenes?

Give the history of the *Ariani Breviarium.*

When did Justinian reign?

By whom was he principally assisted in his work of codification?

Can you state precisely the differences between the Institutes, the Pandects, and the Novels of Justinian?

When, and by whom, was the digest called *Basilicæ* drawn up?

What particular circumstance rendered its preparation necessary?

By whom was it actually published?

When did the study of the Civil Law begin in England?

Who was the first English writer on Law?

Why has the knowledge and influence of the Civil Law prevailed more extensively in Scotland than in England?

Of what nature is the history of a nation's jurisprudence?

During what period did the Civil Law receive its full development? Trace its progress, and give the names and dates of some of its most illustrious expositors. State the leading events of the reign of Justinian.

To the preceding remarks it may be added that the history of the jurisprudence of the Romans, or of any other great nation, is supplemental, as a

source of historical inference, to that of their arts and literature. As the one gives us the measure of their intellectual advancement, the other supplies us with evidence of their social progress, and, as in the case of the Romans, of their competency to occupy the position of rulers of an extensive empire. A perfect system of jurisprudence, and its cultivation *as a science by powerful intellects,* has always been a characteristic of a high state of civilisation; and we find, accordingly, that the period extending from the era of Augustus to that of Justinian was the interval during which the system of the Civil Law was gradually moulded into a form suited to the wants of a comprehensive and multifarious political machine. During the reign of the first emperor the development of that system was so far advanced as to have called into existence a number of eminent jurists, whose interpretations of enactments and expositions of the principles of equity formed the basis of subsequent legislation, and whose personal reputation, in some instances, made them the founders of schools of law, such as those of the Sabinians and Proculeians. Within a period of about 250 years from that time, the Roman law was illustrated, expanded, and liberalised by the *responsa* of a series of enlightened and accomplished lawyers, of whom five were particularly eminent, namely, Papinian, Paulus, Ulpian, Modestinus, and Gaius, whose labours are especially valuable to modern jurists, from the fact that his transcript of the Institutes — a work supposed to have been irrecoverably lost — was discovered in 1816

by Niebuhr, in the library of the Chapter of Verona, containing the letters of St. Jerome written over the original MS.

In almost every Title of the Institutes we can detect evidence of the progress of Roman law, from its rude and elementary state to that phase of developement in which it has been regarded as the Text-book of all modern legislation. We find that the law upon any particular subject in question,—as, for instance, that relating to wills and legacies,—consisting at first of narrow and jealous provisions, and cumbrous and inconvenient formalities, was afterwards relaxed and extended by the several prætors, who appear to have acted in general upon the principle of applying reason and common sense to its administration; and, after receiving a further expansion under the intervening Constitutions, to have been eventually simplified by Justinian into one comprehensive Code.

BOOK I.

A MANUAL OF THE INSTITUTES OF JUSTINIAN.

Title 1.—Of Law and Justice.

Jus signifies law in the abstract, the general principle of justice; and, in a secondary sense, a right or privilege thence derived. The will, or conscientious principle to obey laws, is *justitia;* and the knowledge of law necessary to that obedience is *jurisprudentia. Law* is defined as the science of justice and injustice, in all concerns human and divine; *i. e.* in all that relates to the duties of men to each other, and to their religious obligations.

Law consists of three fundamental obligations: To live decorously (*honeste vivere*), to injure no man (*nemini nocere*), and to render to every man his own (*suum cuique reddere*); but the law does not directly and actually enjoin all the duties implied in these three obligations; for there are some moral duties, included in the first, such as charity, temperance, &c., upon which human law does not insist, and these duties are called *imperfect.* The words

"*Non omne quod licet honestum est*" indicate the exception.

Law consists of two parts: Public Law, which relates to the state of which one is a citizen; and Private Law, which relates to the duties of men toward each other.

Private Law, of which alone these Institutes treat, is divided into the Law of Nature, the Law of Nations, and the Civil Law.

QUESTIONS.

What is law?
Enumerate the three fundamental obligations of law.
Does the law insist upon all the duties involved in these obligations?
What are perfect and imperfect duties?
What do you mean by *jus publicum*, and *jus privatum*?
What are the subdivisions of the *jus privatum*?

Title 2.—On the Law of Nature, the Law of Nations, and Civil Law.

The Law of Nature (*jus naturale*), or the law of all living things, is that which nature teaches to all animals; the law which all other animals obey through instinct, and which man alone obeys rationally.

The Law of Nations is that which reason has established among all human beings, and which all civilised nations observe, both toward each other,

and toward those that are not sufficiently civilised themselves to recognise it.

The Law of Nations is divided into *primary* and *secondary;* the former consisting of that innate perception of justice which existed naturally and originally in all men, even before the formation of communities or nations; and the latter containing those obligations which the progress of society created, such as the laws of contracts, &c.

The obligations of the secondary Law of Nations, in some instances, interfered with those of the primary; as in the case of slavery, which is inconsistent with the natural right of every man to be free.

The Civil Law, or that of citizens, is the law which every state establishes for itself exclusively, and is that part of the *jus privatum* which relates to the reciprocal duties of citizens. "The Civil Law," in a technical sense, is the Roman.

The (Roman) Civil Law consisted of written and unwritten law; the former formally enacted, and the latter gradually established by usage and tacit consent. Much of the unwritten law existing before the passing of the XII. Tables was embodied in them, and thus became written law; and, subsequently, many customs and prescriptions, arising from the increasing wants of society, and founded on the opinions of jurists, came to be considered as unwritten law, under the names of *jus receptum, receptæ sententiæ,* and *jus moribus introductum.*

The sources of the written law are, Leges, Plebis-

cita, Senatusconsulta, Imperial Ordinances (or Constitutions), Edicta Magistratuum, and Responsa Prudentum.

A *lex* was a proposition made by a magistrate of curule rank, and adopted by the whole people in *Comitia.*

A *plebiscitum* was a proposition made by a plebeian magistrate and adopted by the *plebs* in the *Comitia Tributa;* these enactments had power over the *plebs* only, until, by the *lex Hortensia,* they were extended to the whole community.

A *senatusconsultum* was a resolution of the senate, passed without a *veto.*

The emperors derived the power which gave their Ordinances the force of law from the *lex regia* which conferred all legislative and executive powers upon each emperor, on his accession.

The imperial ordinances were of three kinds: 1. *Decreta,* which were decisions of cases or questions brought before the emperor as a judge. 2. *Edicta,* rules made and published beforehand, to be applied to cases which might arise. 3. *Rescripta,* written answers or instructions upon exceptional cases.

These ordinances sometimes referred to the whole community; and sometimes only to particular persons, as in the case of pardons, adoptions, or naturalisations, when they were called *leges privatæ.*

Edicts were proclamations issued by curule magistrates in Rome and by the governors of provinces, on assuming office, to define the principles on which

they intended to act: and these edicts, which gradually modified and formed a sort of supplement to the XII. Tables, were eventually regarded as a body of laws, under the title of *jus honorarium*, by which they were distinguished from the more regularly enacted laws, which were called the *jus strictum*.

The *responsa prudentum* were the opinions and interpretations of celebrated jurists, which were originally unwritten law, subsequently authorised in certain cases by Augustus, and declared by Adrian to have the force of law, so far as they were unanimous. The Civil Law, unlike the Law of Nations, which changes only with the progress of civilisation, and that of Nature, which is immutable, was liable to be altered by new enactments, or by conventional disuse (*Aliâ postea lege datâ, vel tacito populi consensu*).

The subjects of Civil Law are persons, things, and actions: persons, because their relation to each other and to the state may vary; things, because, according to their different qualities, rights may vary; and actions, because they are recognised as the means whereby rights are maintained and established.

QUESTIONS.

What is the Law of Nature?

Define the Law of Nations.

How is the Law of Nations subdivided?

In what case may the secondary law be regarded as inconsistent with the primary?

What are the meanings of the term "Civil Law?"

What difference do you understand between written and unwritten law?

On what occasion was the unwritten embodied in the written law?

What was the essential difference of a *plebiscitum*, as distinguished from a *lex*?

What were the different forms and purposes of the Imperial Ordinances or Constitutions?

State the difference between *jus honorarium* and *jus strictum*.

Were the *responsa prudentum* written or unwritten law?

How was the Civil Law liable to alterations?

What were the subjects of Civil Law; and why?

Title 3. — Of Persons.

A PERSON, in the legal state of the term, is either an individual, a society, or community, capable of possessing rights, and owing duties to others. Men, therefore, in communities where slavery exists, may not be regarded by the law as persons, because slaves enjoy no rights, and owe no social duties. In this case men are merely things, in which certain persons have rights of property.

Persona literally signifies a mask worn by an actor on the stage, and signifies in a secondary sense a representative; hence, a man was considered a person, not with reference to his physical existence, but as representing certain qualities and rights with which he was invested.

Men are divided into two classes, freemen and slaves.

A freeman has the right of exercising all his natural powers, under two restrictions; one of which is the law, and the other the limit of his natural strength. All other restrictions can merely interrupt or suspend his freedom, but not destroy it.

The restriction upon our freedom imposed by law is founded upon the necessity that every individual is bound to forego a certain amount of his liberty, in order to secure the convenience of similar concessions from others.

Slavery is an institution of the *jus gentium*, by which, in violation of the *jus naturale*, one is deprived of his right to do everything not forbidden by law.

Slavery is the consequence either of servile birth (*i. e.* of being the child of a mother who is a slave), or of degradation from the rank of a freeman. In the former case the slave is called *verna*.

Degradation into slavery, under the old (republican) laws of Rome, was produced in either of three ways: 1. Prisoners of war became slaves, according to the *jus gentium*, on the principle that their lives were forfeited, and that, although they were spared, the rights of the conquerors were merely suspended. Prisoners taken by pirates or banditti, however, were considered still free. 2. Insolvent debtors, within thirty days after *adjudicatio* (judgment in favour of the creditor), were liable to be brought into court (*in jus*), and, after a *manûs injectio* (arrest in

execution), to be *addicti*, or surrendered to the creditor, when they became his slaves. About the year U.C. 500, this law was modified; and the debtor, instead of becoming a slave, was obliged to work out his debt. [This custom is evidently alluded to by Horace, Epist. i. 1. 21.] 3. Those who purposely kept their names off the census lists, in order to evade taxes, &c., were degraded from the rank of free citizens. 4. A conviction of theft (*furtum manifestum*), subsequently abolished by the substitution of other penalties.

The causes which might reduce a man to slavery, as recognised by Justinian, were two: 1. The crime of ingratitude on the part of a manumitted slave toward his patron (the master who had set him free). 2. The crime of entering into a fraudulent conspiracy to be sold as a slave for the purpose of sharing the purchase money, because it frequently happened that one freeman allowed himself to be sold into slavery by another, with whom he divided the purchase money, and afterwards claimed his liberty, to which the sale was no bar.

All slaves were regarded by the law as perfectly equal. Any differences in rank between them were matters of domestic arrangement, and depended on the will of their masters.

Of freemen, the law recognised two classes, *Ingenui* and *Libertini*.

QUESTIONS.

What is the meaning, in law, of the term "person?"

What is the primary meaning of *persona;* and what is its secondary signification?

How are persons (*i. e.* men) classified with reference to the obligations of law?

How do you define freedom?

Upon what principle does the law interfere with the personal liberty of freemen?

In what does slavery consist?

How may a man, from being free, become a slave?

To what custom does Horace allude in the words "*diesque lenta videtur opus debentibus?*"

What were the causes of slavery recognised by Justinian?

How did he provide for the punishment of one who, though really free, allowed himself to be fraudulently sold as a slave?

What distinctions of rank did the law recognise between one slave and another?

Was the law similar with regard to the gradations of rank among freemen?

Title 4.—Of the Ingenui, or Freeborn.

An *ingenuus* is one who is freeborn, *i. e.* whose father and mother are both free and lawfully married. The children of married parents took the rank of their father; those of unmarried parents succeeded to the rank of their mothers.

A man who was really freeborn, supposed to be a slave, and manumitted, was regarded, on the discovery of his original rank, not as a freedman,

but as an *ingenuus;* but a freeborn man, if legally degraded into slavery, could only become a *libertinus* by manumission.

Title 5.—Of Freedmen.

A FREEDMAN (*libertinus* with reference to other citizens, *libertus* with regard to his master) was one who, having been a slave, became free by the wish of his master.

The formalities by which freedom was conferred were many and various. Under the old law of the XII. Tables, a fictitious suit at law was instituted, in which liberty was claimed for the slave by some friend, as he had not the right to sue in his own person. (See Livy, iii. 45.) When this demand (*vindiciæ*, or *assertio in libertatem*) was not opposed by the master, the magistrate decided in favour of liberty, by saying, "*Aio te liberum more Quiritium;*" and a rod, called *vindicta*, was laid upon the slave's head, intimating that he was thenceforth free *jure alieno*. Several other forms of manumission were recognised by the Justinian Code: 1. A religious ceremony, introduced by Constantine, in which a bishop, in presence of the congregation, signed an act of enfranchisement. 2. By the *vindicta*. 3. By a declaration made before five witnesses, *inter ami-*

cos. 4. By a deed (*epistolam*) witnessed and signed by five persons. 5. By legacy; and several other forms.

Of freedmen, three classes were recognised under the old law: *cives Romani*, *Latini Juniani*, and *dediticii*. The *cives Romani*, as their name implies, were those whose manumission was perfect and regular; the second class consisted of those who enjoyed actual but not legal liberty (*de facto* but not *de jure*), in consequence of an informality either in the title of the master or in the mode of manumission; *e. g.* when it was effected without any or some one of the recognised modes — enrolment on the censors' list (*census*), *vindicta*, or *testamentum*, and who were afterwards made legally free by the *lex Junia Norbana* (passed in A. D. 17), and thereby entitled to the *jus Latinum*, which meant civil but not political privileges. Hence they were called *Latini Juniani*, because they were freed by the Junian law and enjoyed the *jus Latinum*. The *dediticii* were those who had been, previously to their manumission, punished for some crime, and therefore enjoyed only the same privileges with conquered enemies who had surrendered at discretion.

All these distinctions were abolished by Justinian: he enacted that all persons manumitted, irrespectively of formalities or even of age, which was required to be thirty years by the *lex Ælia Sentia* (passed A. D. 3), should be entitled to the full liberty and privileges of Roman citizens, provided they were manumitted in any of the legal forms; even the old distinction

between *ingenui* and *libertini*, recognised in the Institutes, he afterwards abolished by a *Novella*, retaining only the obligations of *obsequia*, *jura in bonis*, and *opera*, which he still considered that a freedman should pay to his patron. These signified: 1. filial respect; 2. the right of succession to the freedman's property; and 3. the actual service still due to the patron according to compact.

QUESTIONS ON TITLES 4. & 5.

What were the necessary qualifications of an *ingenuus*?

What was the rank of an *ingenuus*, after manumission from a state of temporary slavery?

What is a freedman, and the difference between *libertus* and *libertinus*?

What forms of manumission were recognised by the old law and by the Institutes?

How were freedmen classified by the old law?

How far were these distinctions recognised by Justinian?

What was the *jus Latinum*?

Explain the name *Latini Juniani*.

Under what reservations did Justinian sanction the manumission of slaves?

What do you mean by *obsequia*, *jura in bonis*, and *opera*?

Title 6.—Of Disabilities to manumit.

The power of manumission was limited by the laws *Ælia Sentia* and *Fusia Caninia*: of these laws the former rendered it necessary that the slave to be manumitted should be thirty years of age; that

masters should not manumit to the prejudice of their creditors, nor until they had attained the age of twenty. It also guarded against fraudulent manumissions to the injury of creditors, by declaring such manumissions to be null and void from the beginning, provided they were questioned by the creditors within ten years; but it was afterwards enacted by Julian that, in order to set aside the manumission, there should be evidence of an intention to defraud, as well as of the actual loss.

In one case, however, the manumission was valid; when an insolvent debtor made the slave his heir,—called *hæres necessarius*, because he could not refuse the legacy. In this case Justinian arranged that a slave, by becoming a legatee, was virtually manumitted; for none but a freeman could be a *hæres institutus*.

The *lex Ælia*, however, permitted a master under twenty to manumit by the *vindicta*, if he could satisfy a jury (of ten in the city, and of five in the provinces) of the sufficiency of his motives.

These sufficient motives (*justæ causæ*) were several: such as the emancipation of a parent, an instructor, or a nurse; the emancipation of a male slave, in order to make him a steward or agent; or that of a female for the purpose of marrying her, in which case the master should undertake solemnly to make her his wife in six months. Justinian also extended the limitation of the *lex Ælia*, by allowing a master to emancipate at the age of seventeen.

QUESTIONS.

By what laws was the power of emancipating limited?
What were the provisions of the *lex Ælia Sentia*?
What do you mean by the term *hæres necessarius*?
Under what circumstances could a master under the age of twenty emancipate a slave?
Enumerate some of the legitimate motives.
How was the Ælian law modified by Justinian?

Title 7.— Of the Lex Fusia Caninia.

The object of the *lex Fusia Caninia* was to suppress the abuses arising from the practice of emancipating by legacy, which was resorted to for the purpose of having a large attendance of freedmen at funerals. This was effected by limiting the number to be manumitted according to the whole number of slaves, and fixing the maximum at 100. If the legitimate number was exceeded, that number was selected from the first of the list; and if the names were written in a circle, none could be emancipated.

This law was abolished by Justinian, on the principle that it was absurd to withhold from a man when dying a power which he might freely exercise while living.

QUESTIONS.

What were the object and provisions of the *lex Fusia Caninia*?
Why was it repealed by Justinian?

Title 8.—Of the Terms "Sui Juris" and "Alieni Juris."

All the members of a family were either independent (*sui juris*), or subject to others (*alieni juris*). Of the former class were the heads of families, the *paterfamilias* or *materfamilias*, though not always necessarily parents; and their authority was in some cases parental (*parentium potestas*), in others that of masters or proprietors (*dominorum potestas*): to the latter class children and slaves were subject, children being under the *patria potestas*, and slaves under the *dominica*.

Under the old law the master had absolute power over the person, property, and life of the slave. But Antoninus Pius, by a Constitution and afterwards by a Rescript, deprived masters of the power of life and death, and of inflicting excessive punishments; gave to slaves the right of legal redress, and to magistrates the power of enforcing the sale of a slave on terms advantageous to both parties. These terms were, that the master should not sell on credit or under the value, nor upon any understanding with the purchaser that the slave should be ill-used.

These restrictions were imposed, not with a view to encroach upon the right of the master, but to provide for its being exercised in a manner consistent with the public welfare. But the right of the master over all property acquired by the slave (*peculium*) was allowed to exist in its original force.

QUESTIONS.

What persons were considered *sui juris*, and *alieni juris*?

What was the extent originally of the master's power over a slave?

By whom and how far were these rights afterwards modified?

On what principle were these modifications introduced?

Title 9.—Of Parental Authority (*Patria Potestas*).

The parental authority was the power which the head of a family possessed over all those who belonged to it by birth, or who became members of it by lawful marriage, legal legitimisation, or adoption.

This power, during the Republic, consisted of the rights to sell, abandon, and inflict punishments,—even that of death,—and to possess all property acquired by those subject to it; and was different from the parental authority recognised by all other states, where it ceased as soon as children attained maturity: it also differed, by being a portion of the Civil Law, from the *dominica potestas*, which was part of the *jus gentium*.

This power was considerably diminished by the Ordinances of successive emperors: by Trajan, who freed from parental authority a son who had been ill-treated; by Diocletian, who abolished the privilege of selling, bestowing, and pledging children; by Alexander Severus, who empowered magistrates to decide upon punishments; and by Constantine,

who made it a capital offence to take the lives of children, and forbade the sale of them, except in cases of extreme poverty.

The authority of a *paterfamilias* extended to his son's children, but not to his daughter's; for these were considered members of their fathers' families.

For this reason, also, a family of which a woman happened to be the head began and ended with her, — she was *familiæ suæ et caput et finis.* [The extinction of families among ourselves, occasioned by our law of surnames, is strictly analogous.]

QUESTIONS.

Over what members of his family did the authority of a *paterfamilias* extend?

What powers did he enjoy under the old law?

How did this power differ from that to which slaves were subject?

To what extent, and by whom, was the *patria potestas* modified?

Title 10.—Of Marriage.

A LAWFUL marriage (*justæ nuptiæ*) is the union of a man and his wife by a solemn religious or civil ceremony.

Under the old law, a marriage might be contracted by simple consent, by the fictitious formality of the purchase of a wife (*coëmptio*, or *per æs* et *libram*); or by the emblematic ceremony

of dividing a cake between the parties (*confarreatio*). But by the Imperial law these ceremonies were abolished, and nothing more was required than that the parties should be of mature age; that they and certain of their relatives should give a free consent; and that they should not be disqualified by too close a relationship or other causes, such as physical deformity or lunacy. The absence of these disqualifications was signified by the term *connubium*. Besides these conditions, however, the ceremony of a written deed (*tabulæ nuptiales*) or registry was sometimes employed.

The legitimate age was fixed by Justinian at fourteen for males, and twelve for females.

The persons whose consent it was necessary to obtain, in addition to that of the parties themselves, were those relatives under whose *patria potestas* the intended husband and wife were, or their future children would be: and this consent might be either expressed or implied by silence; but in cases where the consent of parents could not be obtained, in consequence of absence or mental incompetency, it was dispensed with. Children emancipated from *patria potestas* need ask no relatives' consent; but the Ordinances of Valentinian, Valens, Honorius, and Theodosius, obliged women under the age of twenty-six to obtain the consent of their parents, or nearest relatives.

Of relationship, three kinds were recognised by the Roman law: *cognatio*, relationship by blood; *agnatio*, the civil relationship between all who were members of the same *familia*; and *affinitas*, the

relationship between two families connected by marriage. These several relationships created obstacles of different kinds to the marriage of persons between whom they existed, viz.: no two persons standing in the same relationship to a common ancestor could marry, except cousins two or more degrees removed. Civil relationship was no bar to marriage when the parties belonged to different *familiæ;* and *affinitas* prevented marriage between a man and any ancestor or descendant of a deceased wife, and *v. v.*

By an Ordinance of Constantine, marriage of brothers and sisters in-law was forbidden; and there were other cases in which marriage, though not actually unlawful, was considered disreputable; for instance, that of a man with a woman who had been affianced to his son, or *v. v.*

No marriages between slaves were recognised by law.

A lawful marriage as described above, could be dissolved only by death, by divorce, or by loss of liberty.

Children unlawfully born might be made legitimate by the subsequent marriage of their parents; by the *oblatio curiæ,* i. e. admission to the senate of a municipal town, or by an Imperial Rescript.

QUESTIONS.

What were the modes of contracting marriages under the old law?

What ceremonies were necessary under the Imperial laws?

What were the legitimate ages according to the law of Justinian?

Of whom was it necessary to obtain consent?
Were there any exceptions to this regulation?
What were the different kinds of relationship?
How did these affect the liberty to marry?
What was meant by *connubium?*
What was the condition of slaves with regard to these laws?
How might marriages be dissolved?
By what ceremonies might natural children become legitimate?

Title 11.—Of Adoption.

Adoption was the act by which one man acquired paternal authority over the child of another, and children so transferred were called *adoptivi.*

Adoption was of two kinds: *adoptio,* properly so called, and *adrogatio,* by which a person already *sui juris* became subject to *patria potestas.*

Under the old law, a son was freed from his father's authority by thrice undergoing the ceremony of being sold to another, after which his father could not recover him; but, to make him really the adopted son of another, it was necessary to resort to a fictitious law-suit, called *cessio in jure,* by which the adopter publicly claimed the child in court, and, when the father made no objection, obtained possession of him from the magistrate.

Under the law of Justinian, it was only required that the father should make a declaration before a magistrate in presence of the adopter and the adopted. The consequences of adoption also were modified by

Justinian; for while, under the old law, an adopted son ceased to be his father's heir, without any certainty of an inheritance from his adopter, Justinian ordered that, if the adopter was one unconnected by blood, the adopted should still retain his original rights, and inherit the property of his adopter if the latter named no other heir.

Adrogatio, by which the *adrogatus* and everything subject to his authority passed into the power of the *adrogator*, was originally effected by the sanction of the people, and afterwards by the sanction or Rescript of the emperor.

There were some other differences originally between these two sorts of adoption; viz., that women and minors, though they might be adopted, could not be adrogated; but this distinction was abolished by Justinian in favour of women, and by Antoninus Pius in the case of minors, under the following conditions: that the *adrogator* should restore any property received from the *adrogatus*, if he emancipated or disinherited him; that in case of the death of the *adrogatus* while a minor, such property should go to his natural representatives; that he should give security for the fulfilment of these conditions, and leave to the *adrogatus* one-fourth at least of his own property.

It was necessary, in all cases, that there should be between the ages of the two parties the same difference that might have been if they were really father and child.

An adopter was permitted to name his real son as

the father of one adopted, because, in the ordinary course of events, that son would become the *pater-familias*. He might also give an adopted son to be adopted by another; but he could not, like the real father, take him back.

Women were sometimes allowed, by favour of the emperors, to replace their lost children by adopting others.

Freedmen could be adopted only by their patrons; and slaves could not, as such, be adopted at all; for adoption was a virtual emancipation; and therefore, if a master called a slave "his son" before witnesses, it was regarded as an act of emancipation.

QUESTIONS.

What was adoption?

How many kinds of adoption were there?

What forms were necessary to constitute an adoption, properly so called?

How did Justinian alter the forms and the effect of adoption?

What were the forms of *adrogatio* at different times?

Were the same persons always eligible for either form of adoption?

On what conditions, by the law of Antoninus Pius, might *impuberes* be *adrogati*?

What difference was necessary between the ages of the adopter and the adopted?

Can you mention any difference between the right of a real father and an adopter?

When were women permitted to adopt?

What was the position of slaves and freedmen with regard to adoption?

Title 12.—Dissolution of the Patria Potestas.

Parental authority might be dissolved, involuntarily, by the death of father or son, by the loss of citizenship to either, and by the son's elevation to certain dignities; voluntarily, by emancipation and by adoption.

The death of a father released all the sons from the *patria potestas.* Each of them then became *sui juris* and a *paterfamilias;* but when the head of a family had sons and grandsons, the sons only became *sui juris,* and the grandsons became subject to their several fathers.

The loss of citizenship or liberty was regarded as a sort of civil death, and was followed by the same results as natural death. A man lost his citizenship when he emigrated, or when he was banished by *aquæ et ignis interdictio.* This was a legal fiction; because, as no man could be forcibly deprived of his civil rights, it was necessary to oblige him indirectly, by depriving him of the necessaries of life in his own country, to go elsewhere. Under the Emperors, this form of banishment was superseded by *deportatio* and *relegatio;* of which the former involved the loss of all rights as a citizen, unless he was recalled by the emperor; and even then he resumed his rights only for the future, unless he was said to be restored *per omnia,* when he recovered all his former rights. *Relegatio* implied absence merely, with the possession of all the rights of a citizen.

The consequences of a loss of liberty by captivity

were counteracted by a legal fiction called *jus postliminii* (the right to return), by which, on the return of a captive, he enjoyed the same rights as if he had never been absent. In cases of captivity, the *patria potestas* was merely suspended; and if it ended in death, the children were considered to have been *sui juris* from its commencement.

Originally, the dignities which had the effect of dissolving the *patria potestas* were only those of flamen and vestal; but Justinian attached that effect to the *patriciatus* (an *ex-officio* nobility conferred on the emperor's privy councillors), to bishoprics, consulships, and some other high offices. It was arranged, however, that sons so emancipated should, on their fathers' death, stand in the same position as if they were only then becoming *sui juris*.

Of *emancipatio*, whereby a father divested himself of all parental authority, there were three forms: 1. That under the old law, effected by a form of fictitious sale thrice repeated, after which, by a trust-clause accompanying the third sale (*fiducia contracta*), the son was emancipated to his father, who then assumed the relation of a patron. 2. The *emancipatio Anastasia*, which was effected by obtaining and registering a Rescript, and might take place in the absence of the son; this could not be done under the old form, which required the *manus injectio*. 3. The *Justinia*, which consisted only of a declaration made by the father before a magistrate. The advantages resulting from emancipation to the emancipated might, in all cases, be forfeited by ingratitude.

A grandfather had, by law, the power of emancipating his grandson, or giving him to be adopted, irrespectively of the consent of the grandson's father, but not without the consent of the grandson; but a father could not be compelled by his children to surrender his authority over them, except they could prove that they had been ill treated.

QUESTIONS.

How might the *patria potestas* be dissolved?

Did the death of a *paterfamilias* in all cases put an end to *patria potestas* in the family?

Why had the loss of liberty or citizenship the same effect as death?

How did one cease to be a citizen?

What was the difference between *deportatio* and *relegatio?*

How could a *deportatus* recover his civil position?

What was meant by the *jus postliminii?*

What dignities enjoyed by children had the effect, at different times, of dissolving or suspending the *patria potestas?*

What were the different forms of *emancipatio?*

What do you mean by the term *fiduci acontracta?*

Under what circumstances might the benefits of emancipation be forfeited?

Grandfathers enjoyed a peculiar power over their grandsons, being their sons' sons—What was it?

Could children, under any circumstances, throw off the *patria potestas?*

Title 13.—Of Guardianship (*Tutela*).

All free persons (*libera capita*) were either wholly independent, or *in tutelâ*, or *in curatelâ*.

Tutela was a power (*vis ac potestas*) granted by the law over persons *sui juris* and *impuberes*, who were not yet qualified by age to protect themselves, and who were in that case called *pupilli* (wards).

This *tutela* was of three kinds: *legitima* (instituted by law), and *testamentaria* (authorised by bequest), both which were created by the XII. Tables; and *Atiliana* or *dativa*, hereafter defined.

Guardianship, though regulated by the *jus civile*, was really a part of the *jus gentium;* for it was naturally and obviously necessary that those who were not competent to their own guidance and protection should be placed under the *surveillance* of others: it differed also from *patria potestas*, by being exclusively for the benefit of the wards, because while the *paterfamilias* was the actual possessor of the *filii* and all their property, guardians (*tutores*) had no rights over the properties of the *pupilli*.

Tutela testamentaria could be established only by the will of a *paterfamilias*, and over those only who would, on his death, become *sui juris*. A grandfather, therefore, could not place his grandsons in *tutela testamentaria*, because, after his death, they would pass into the *patria potestas* of their fathers. But a father could place all his sons, living and posthumous, under *tutela*, except such as had been emancipated,—and even these, when the nomination of a guardian was confirmed by the proper magistrate.

The appointment of a guardian by any other person than the father needed to be confirmed by

a magistrate, and that only on investigation, and when the father had made the *pupillus* his heir.

QUESTIONS.

What was *tutela?*
Enumerate the different forms of *tutela.*
How did *tutela* differ from *patria potestas?*
Who had the right to establish a *tutela testamentaria?*
Were there any exceptions to this rule?

Title 14.—Of Tutores Testamentarii.

No persons could be appointed testamentary guardians but those who had the relation of *testamenti factio* with the testator, *i. e.* whom he might make his heirs; or those who were capable of filling public offices, of which *tutela* was regarded as one; and, therefore, women could not be guardians, unless by the express permission of the emperor. Hence a son might be nominated as a guardian, because he might be an heir; but a slave could not, as such, be made a guardian, and therefore, by the law of Justinian, such an appointment was considered to imply emancipation, unless the words *cum liber erit* were inserted, which disclaimed any immediate intention of emancipation.

No lunatic or person under the age of twenty-five could be a guardian.

Guardians might be appointed either absolutely or conditionally, *i. e.* for the period between two specified dates.

Every will, in order to be legally such, should contain an *institutio hæredis;* and of the two great sects of lawyers, the followers of Sabinus and Proculus, who both flourished in the Augustan age, the former held that the nomination of a guardian should follow, and the latter that it might precede, the *institutio hæredis,* because it interfered in no way with the *hæreditas.* Justinian adopted this latter view, and declared it to be immaterial which of the clauses came first.

It was necessary that the guardianship should not be restricted to any particular concern or interest; for it related, in the first instance, to the person of the ward, and, as a necessary consequence, to all his interests. In cases, however, where a ward possessed property in several places, a guardian might be appointed for each locality; but this was rather a division than a limitation of the *tutela.*

A testator appointing a guardian for his sons and daughters was understood to include posthumous children, but no grandchildren, unless he used the term *liberi,* which included all issue; but this rule was modified by circumstances.

QUESTIONS.

What persons were eligible as testamentary guardians?

What persons were excluded by this rule?

What is the meaning of the phrase *testamenti factio?*

What was the consequence to a slave of his nomination as a guardian?

Was it necessary in all cases that the *institutio tutoris* should follow the *institutio hæredis?*

Were the functions of a guardian subject to any limitation or division?

Over whom was a testator empowered to appoint guardians?

Title 15.—The Tutela of Agnati.

By the law of the XII. Tables, *agnati* might become guardians when the father had made no testamentary provision as to guardians, or had survived the guardians whom he had named. But when a guardian was named conditionally, *i. e.* to enter upon his duties not until (*ex*) a certain time, the only guardian who could act in the interval was a *tutor dativus* (appointed by a magistrate). This rule was founded on the principle that, as long as a testamentary guardian existed, there could be none appointed by the law (*legitimus*); but when a testamentary guardian was appointed only for an interval, the testator was regarded as intestate with respect to preceding and succeeding intervals; and, to make provision for these, the law interfered.

The *agnati* were all those who had been, during the life of a *paterfamilias*, under his *patria potestas*, and who afterwards became the heads of so many separate *familiæ*. Justinian, therefore, defined *agnati* to be those who were related to each other through males; all having the same *nomen*, but different *cognomina*, as, for instance, the *Fabii Maximi* and *Fabii Ambulones*. But there may have been excep-

tions to this definition; for the tie of *agnatio* might be severed, while that of *cognatio* still continued.

Of the *agnati*, those nearest in relationship succeeded to *tutela*, as to other rights.

QUESTIONS.

Under what circumstances might *agnati* become guardians?
When did the law interfere in the nomination of guardians?
What persons stood in the relation of *agnati* to each other?
How does Justinian define them?
What was the rule for the selection of a guardian from the *agnati*?

Title 16.—Of Diminutio Capitis.

The status of a Roman citizen was constituted of three elements, liberty, citizenship, and family. The loss of these, or either of them, involved respectively three corresponding degrees of degradation, viz. *diminutio capitis*, *maxima*, *media*, and *minima*.

Maxima resulted from the loss of liberty, which involved also the loss of citizenship and family.

It was called *media*, when, although liberty was retained, citizenship was lost, and involved the loss of family.

The *minima* took place when one's family was changed by *adrogatio* or *adoptio*, or *emancipatio*; his liberty and citizenship remaining unprejudiced. The person suffering any of these sorts of degradation was called *capitis minor*, or *capite minutus*.

The origin of the phrase *diminutio capitis* was this: every community, society, and family, was regarded as consisting of a certain number of heads or individuals (*capita*), and the loss or degradation of an individual diminished such community, society, or family, by a head.

But the emancipation of a slave, or the degradation of a senator (who was then said to be *ordine*, or *senatu motus*), was not considered a *diminutio capitis;* because a slave was *nullum caput*, and senatorial dignity was merely an adventitious circumstance, and not essential to citizenship.

The relationship of *agnatio* was, in all cases, destroyed by any *capitis diminutio;* for it depended upon connexion with a family; but *cognatio*, being a natural tie, was affected by it only so far as the *maxima* and *media capitis diminutiones* interfered with the civil privileges which it conferred.

QUESTIONS.

What was the *capitis diminutio?*

Enumerate the several degrees of it.

How did it affect the condition of slaves, and those invested with conventional dignities?

What were its effects upon the different sorts of relationship?

Title 17.—Of the Legal Guardianship of Patrons.

The only persons capable of becoming guardians over *freedmen pupilli*, were their patrons.

This is an obvious inference from, though not an express enactment of, the law of the XII. Tables; for that law ordained that the persons eligible as *tutores legitimi*, were the nearest relatives of the *pupilli*, because they were those who stood in the position of successors to the property of the *pupilli*, and had therefore the strongest interest in its welfare; then, as the heirs of freedmen were by law their patrons and patrons' children, it was inferred that, according to the spirit of that law, the patrons of freedmen were alone their legitimate guardians.

Guardianship was always understood to devolve upon the heir presumptive of the *pupillus*, unless such heir was disqualified by sex or age, as already defined.

QUESTIONS.

Who were the legitimate guardians of freedmen?

Upon what law was this founded?

Explain the principle of the law, and the logical necessity of the deduction.

What were the exceptions to this rule?

Title 18.—The Tutela vested in Ancestors.

The legal guardianship of sons and daughters devolved upon the *paterfamilias*, because he was the only person, when they were emancipated, who could assume the relation of patron towards them. Sons were emancipated under the age of fourteen, and daughters under twelve.

Title 19.—Of Tutela Fiduciaria.

The *tutela fiduciaria* was the name given to the guardianship which sons, not emancipated, were entitled to exercise over other members of the family who had been emancipated, in cases where the emancipating *paterfamilias* had died without naming a *tutor testamentarius*.

It was called *fiduciaria*, to distinguish it from the *legitima tutela*, which was either directly or by implication sanctioned by the XII. Tables, — as they contained no provision for the tutorial rights of emancipators, and as it could not be included in the *tutela legitima*, of which the several cases were as follow: — 1. If the *pupillus* was a freedman, his guardian was his patron, or his patron's heir. 2. If the *pupillus* was a freeborn *filiusfamilias*, becoming *sui juris* by the death of the *paterfamilias*, and neither emancipated nor *capite minutus*, his *tutor* was the nearest *agnatus*. 3. If such *pupillus* had been formally *capite minutus*, *i. e.* for the purpose of

emancipation, his emancipator was *tutor legitimus*. But, after him, any other guardian (as above stated) was *fiduciarius*.

Justinian, however, introduced, by the 118th *Novella*, a new system of succession, which of course involved a new system of guardianship.

QUESTIONS ON TITLES 18. & 19.

Who was the *tutor legitimus* of a *filiusfamilias*?
What was *tutela fiduciaria*?
Why was not this also a *tutela legitima*?
In what cases did *tutela legitima* arise?
What effect had the law of Justinian upon this system?

Title 20.—Of Tutela Dativa.

The *tutela dativa* was that vested in persons nominated by certain magistrates, in cases where they were not provided by testament or law. These were: when a testamentary guardian was to enter upon his *tutela* not until a certain time, or to resign it after a certain time, the interval before or after was filled by a *tutor dativus*; when the testamentary guardian was named absolutely, the interval before the appearance of the *hæres institutus* was filled by a *tutor dativus*; when the testamentary guardian was taken prisoner, a *dativus* was appointed until it should be known whether he would return, and resume his *tutela* by the *jus postliminii*; but, if there was reason to despair of his return, then a *tutor legitimus* came in. It was further arranged,

that, in case a testamentary resigned, or was dismissed, a *tutor dativus*, and not a *legitimus*, should succeed him.

The magistrates in whom the right of this appointment was vested were originally, by the *lex Atilia*, the *prætor urbanus* and a majority of the tribunes, for the city; and in the provinces, by the *leges Julia* and *Titia*, the governors. Subsequently, the right was extended to the consuls by Claudius, and afterwards to the prætors by Antoninus Pius.

There were still further extensions of the power: in the time of Septimius Severus it was held by the warden (*præfectus*) of the city, in addition to the *prætor urbanus;* and in the provinces it was occasionally delegated to the municipal magistrates, in cases where the properties involved were considerable: and Justinian authorised subordinate magistrates in the provinces to nominate guardians on their own responsibility, in cases where the property involved was under 500 *solidi;* but such guardians were required to give security, until they should be confirmed by the governor after an inquiry.

All guardians were called upon, at the expiration of their *tutela*, by an *actio tutelæ*, to render an account of their administration.

QUESTIONS.

In what cases did guardianship become a *tutela dativa?*
What magistrates had this power originally, and by what law?
How far was the power afterwards extended?
What was Justinian's law on this subject?
Were guardians ever liable to be called to account?

Title 21.—Of the Authority of Guardians.

Guardians were authorised to act together upon their own discretion and judgment while the ward was an *infans, i. e.* under the age of seven years; but after that time a co-operation existed between them; the ward was then supposed to have *intellectum quendam, sed non animi judicium* (some degree of understanding, but no judgment), and though he might "make his condition better," *i. e.* acquire property and confer obligations, he could not, without his guardian's concurrence, "make his condition worse," *i. e.* alienate anything, or incur obligations. The guardian's concurrence was especially necessary in the latter of these cases; because, although such alienation or obligation incurred might not be actually a loss, the judgment of the guardian was necessary to decide upon the probability of compensating advantages.

In the case of contracts entered into by a ward without the concurrence of the guardian, the other party alone was bound,—that is, he could not be the first to retract; but if the ward refused to perform his part of the contract, he could not compel the other party to perform his, nor evade remunerating him for any portion of it already performed.

There were certain acts, apparently beneficial, which a ward could not perform on his own judgment; such as accepting an inheritance as an heir, or as a trustee (*ex fidei commisso*), and demanding a *bonorum possessio* (authority from the prætor to

possess property to which the Civil Law did not entitle him); because, in these cases, he was not supposed fully capable of estimating the responsibilities contingent upon such acts.

When the guardian co-operated in (*auxit, auctor factus est*) the act of the ward, it was necessary that he should do so at the precise time of the act (*statim in ipso negotio*), and in person (*præsens*).

Although the guardian might, in general, act by himself, there were some cases in which the ward should appear in person; viz., an act of *adrogatio*, the emancipation of a slave, or the acceptance of a *hæreditas*.

If the ward instituted a lawsuit against his guardian, he was represented by another guardian, nominated by the prætor; and in later times by an agent (*curator*) appointed for the occasion, because the previous custom of appointing a guardian for one special purpose was contrary to the principle upon which guardians were generally appointed.

QUESTIONS.

How did the power of guardian vary according to circumstances?

How far was it necessary that guardian and ward should co-operate?

What do you mean by the technical phrases, "making one's condition better," and "making it worse?"

Why was the guardian's concurrence more necessary in one case than in the other?

How did the law of contracts affect a ward?

When and how was the guardian's consent to be given?

In what cases should the ward co-operate in person in their joint acts?

Might a ward sue in person in case of a lawsuit with his guardian?

Title 22.—Of the Expiration of Guardianship.

The authority terminated in any of the following six cases: — 1. When the wards attained the age of maturity which was fixed by Justinian, as already stated. On this subject, a difference of opinion had long existed between the Sabinians and Proculeians, who may be regarded respectively as the Whigs and Tories of Roman law; the former advocating and the latter opposing innovations. The view taken by Justinian was that of the latter school, as establishing a more definite standard than that of the Sabinians, who held that maturity should be estimated by the growth of the body and not by years. 2. By the death or any *capitis diminutio* of the ward. 3. By the guardian's death. 4. By the *diminutio capitis, maxima* or *media,* of the guardian; for he then ceased to be a citizen and capable of holding a public office: or by his *dim. cap. minima,* if an *agnatus* and *tutor legitimus;* for he then lost his connexion with the family, which constituted his right to the *tutela.* 5. In the case of *testamentarii,* by the expiration of the period specified; and in the case of *dativi,* by the expiration of the interval for which they had been provisionally appointed. 6. By ex-

cuses advanced by the guardian and recognised by a magistrate.

QUESTIONS.

Of how many causes might any one terminate the authority of a guardian?

What were the respective opinions of the Sabinians and Proculeians on the subject of maturity?

Why did his *diminutio capitis*, *maxima* or *media*, terminate the *tutela* of a guardian?

What effect had *dim. cap. minima* upon *tutela?*

What terminated the *tutelæ* of guardians *testamentarii* and *dativi?*

Title 23.—Of Curatela.

CURATELA was the supervision exercised over those minors whose guardians were incompetent or suspended, because no ward could have two guardians; over adults under the age of twenty-five; over lunatics and spendthrifts, of any age, pronounced incapable of managing their own affairs by the prætor's injunction (*interdicto*); and over persons afflicted by incurable diseases or physical defects. A guardian, however, to avoid being superseded by a *curator*, might, if he found himself incompetent, apply to the prætor for an agent (*actorem*), for whose acts the said guardian was responsible: for the same purpose, the ward himself, if present and old enough, might, with the guardian's consent, appoint an agent (*procurator*). Adults could not, as a general rule, be compelled to accept *curatores*; but there were three

cases in which the law enforced it, — 1. When they were parties to law suits. 2. When receiving payments. 3. When calling their guardians to account. The object was to have satisfactory evidence of the settlements or payments.

But if an adult under twenty-five accepted a *curator*, he could not resume the management of his own affairs until he attained that age, except by a dispensation from the emperor.

The *curatela* of such lunatics and spendthrifts as were the legal representatives of *patresfamiliarum* dying intestate, was alone *legitima*, being vested by a law of the XII. Tables in the nearest *agnati*: in all other cases it was *dativa*; *curatores* being nominated by the same magistrates who appointed guardians.

Curators differed from guardians, in being set over the properties rather than the persons of their wards, in being sometimes appointed for special purposes, and being obliged to act as their law agents when they were themselves incapacitated.

QUESTIONS.

To what cases was *curatela* legally applicable?

How might a guardian avoid being superseded by a curator?

Who were *actores* and *procuratores*?

Under what circumstances were adults (*adolescentes*) compelled to accept *curatores*?

How soon could a *curator*, once appointed, be dispensed with?

In what cases was *curatela legitima*, and when was it *dativa*?

How did a *curator* differ from a *tutor*?

Title 24.—Of the Security required of Tutores and Curatores.

The security (*cautio*) required of *tutores* and *curatores* was of various kinds: such as, the security to be given previously to entering upon their duties, and necessary to the validity of their acts; the inventory taken before their duties commenced; the formal liability of their properties; the oath (in all cases regarded as a *cautio*) required by a Novel of Justinian, that they would act conscientiously, as fathers; and the collateral security of another person, called *satisdatio*, which was the form of security most generally given by *tutores* and *curatores*.

Security was not, however, in all cases indispensable; for testamentary guardians were considered sufficiently accredited by the will. Testamentary guardians and *curatores*, appointed by a father's will, subject to further confirmation, were also, by that confirmation, exempted; and for the guardians and *curatores dativi*, the investigation and nomination of the magistrate constituted a sufficient guarantee.

The *legitimi*, however, were always called on for security, which was generally dispensed with by the prætor in the case of fathers and patrons; and when several were appointed together, the one who acted and was called *onerarius*—the rest being *honorarii*—might be required to give security, or to resign in favour of any other who offered it. But, if none of them tendered security, the *onerarius* was selected by the majority, or, in case they disagreed, by the ma-

gistrate; except when they divided the several departments of the administration between them.

When a guardian refused to give security, his goods were liable to be taken in satisfaction; after which, if he still refused, he was considered *suspectus* (hereafter explained); and the magistrate who accepted the security, or dispensed with it, was made accountable by an *actio subsidiaria* against himself or his representatives; but this was only in cases of gross negligence and of inferior magistrates.

QUESTIONS.

Enumerate the different forms of security or *cautio*.

Which of these was more particularly required of *tutores* and *curatores*?

Were they required to give security in all cases?

On what principle were the *testamentarii* and *dativi* exempted?

What do you mean by *onerarii* and *honorarii* guardians or curators?

How were the *onerarii* chosen?

How far were magistrates answerable for the exercise of their authority in these cases?

Title 25.—Of the Exemptions of Tutores and Curatores.

Tutela and *curatela*, being regarded as public duties, could be evaded only on the following lawful considerations:—1. The number of one's own children, including those adopted, emancipated, and slain

in battle; which number was three in the city, four in Italy, and five in the provinces. 2. An office in either the public or imperial treasury (*ærarium* or *fiscus*), which were eventually combined. 3. Absence on the service of the state, which exemption was only temporary if the appointment had preceded the absence. 4. Election to a magistracy, if preceding the appointment. 5. Litigation on the subject of property between the principal parties. 6. Previous occupation in the same duties, if such as not to allow sufficient leisure. 7. Poverty, which rendered one's time too valuable to himself. 8. Delicacy of health. 9. Want of sufficient education. 10. The circumstance of having been nominated merely with a view to impose a burden. 11. An enmity (*inimicitia capitalis*) between the principal parties. 12. A suit on the part of the *paterfamilias* involving the status of the guardian. 13. Age, if under twenty-five, or over seventy. 14. The military profession. 15. A learned profession, and 16. (peculiar to *curatores*) the previous existence of a *tutela*, or the subject of the *curatela* being one's wife. Of these exemptions the second was allowed by Marcus Aurelius, and the seventh by Aurelius and Lucius Verus.

Upon any of these grounds, exemption should be claimed before a magistrate within fifty days, running from the day on which the *curator* or *tutor* became aware of his nomination; and, on the failure of one excuse, another might be urged within the given time. Any excuse, however, to be admitted, should be true and satisfactory.

QUESTIONS.

How many legitimate grounds of exemption were there from the responsibilities of *tutela* and *curatela*?

Which of these related to *curatela* exclusively?

How and when should these exemptions be claimed?

Was the result of the first plea final and decisive?

By what authorities were employment in the treasury, and poverty, recognised as exemptions?

Title 26.—Of Tutores and Curatores Suspecti.

A GUARDIAN or *curator* was called *suspectus* when unfaithful to his trust or of disreputable character; and this suspicion could be obviated only by fidelity and upright character, not by solvency or security. In such a case the law of the XII. Tables made provision for his removal by an appeal to the prætor, in the city, or to the governor or his representative, in the provinces. But if the guardian so *suspectus* happened to be the patron or near relative of the ward, he was either associated with a curator, or, if removed, was spared the *infamia* which resulted in other cases and was considered to disqualify one from holding a public office. In these appeals, any friend or relative (even a woman, if interested by affection) might represent the ward, if under age; and the *tutor* or *curator* in question was suspended during the suit.

The consequence of conviction was punishment by the *præfectus urbi*, in the cases of freedmen or those

who had resorted to bribery to obtain their nominations: in all other cases it was merely removal.

In addition to the above-mentioned causes, a guardian who was required to appear before the prætor, to assist in fixing the amount of the ward's alimony, and refused to come forward (*copiam sui facere*), was removed as *suspectus*, and the ward put into possession of his goods, which were usually sold by a curator for the ward's benefit. If he did appear, however, and falsely depreciated the property of the ward, he was removed, and punished by the *præfectus urbi*.

QUESTIONS.

When was a guardian or curator called *suspectus*?

Would his solvency or offer of security be considered as a bar to an accusation?

By what law was provision made for these cases?

What magistrate had this jurisdiction?

How did the penalties of conviction vary according to circumstances?

What was the consequence of *infamia*, or loss of *existimatio*?

When was the non-appearance of a guardian punishable?

BOOK II.

Title 1.—Of the Classification of Things and the Acquisition of Property.

The term *res* included all existences, material and immaterial, and was subdivided into things within our *patrimonium* and without our *patrimonium;* of which the former only might belong to individuals, under the name of *bona* or *pecunia.* Of the latter there were four kinds:—1. Common, which belonged to everybody using them for the time: such as, the water of a river, the sea, the seashore, or land which might become the property of the first occupant. 2. Public, which belonged to the state, but which all might use under certain circumstances, such as rivers, harbours: the banks of rivers, however, though open to the temporary use of all, were generally private property. 3. *Res universitatis,* belonging to a corporation for the use of its several members; and these, when not open to the use of individuals, were said to be *in patrimonio universitatis* or *populi, i. e.* the property of the corporation or community regarded in law as an in-

dividual. 4. *Res nullius*, which neither do nor can belong to anybody; such as (1.) *Res sacræ*, consecrated by the pontifices under authority of the emperor, and capable of being applied to human uses, by the law of Justinian, only for the redemption of captives, the relief of a famine, or the payment of church debts. But this exception did not extend to the sites of decayed consecrated buildings. (2.) *Res religiosæ*, things associated with ideas of solemnity, *e. g.* burial places, which became *religiosæ* by the interment of the dead and the consent of the proprietors; and (3.) *Res sanctæ*, not consecrated, but declared inviolable by law, which enacted a penalty (*sanctio*) for their violation; for instance, the persons of magistrates, the walls and gates of a city, &c.

Dominium (or ownership) involved the right of using things, the right of enjoying their produce and profits, the right to dispose of or alienate it, and the right to claim it back from another; and these rights, which were expressed by the phrases *usus fructus, abusus*, and *vindicatio*, were restricted by law to certain limits.

Property (*dominium*), or the right of proprietorship (*possessio*), was acquirable under the *jus gentium* in three ways:—1. By *occupatio*, which was the act of the first occupant of a thing previously unappropriated; such as the catching wild animals, the finding precious stones in unoccupied places, the making prisoners of war, &c.; but in the case of these latter, as in that of wild animals, the ownership ceased

whenever they regained their liberty, which may be considered the effect of a sort of *jus postliminii.*

2. By *accessio,* which was the natural increase of anything possessed, such as the produce of land and cattle; or its enlargement by the addition or adhesion of any accessory, as the addition to one's land of the alluvial deposit of a river. In this particular case, there were several regulations to be observed: a gradual accumulation belonged to the proprietor of the bank, if his lands were not (*limitati*) restricted to a certain measure, but (*arcifinales* or *occupatorii*) extending to the river, wherever it might be. If a distinct mass of soil were brought by the stream, it still belonged to its original proprietor. If an island rose in the river, it belonged to the proprietors of the banks in proportion to the frontage owned by each; but if the bed of the river suddenly changed, the land left dry was disposed of as the island, the new bed becoming a *res publica.* Under the head of *accessio* may be also considered the change effected in the nature or form of a thing, which was called *specificatio, i. e.* the making a new form, such as changing marble into statues, wool into cloth, corn into bread, &c.; and in such cases, when one man manufactured raw materials belonging to another, the Proculeians held that the manufactured article belonged to the manufacturer, as the original material had ceased to exist, and "*res extinctæ vindicari non possunt;*" while the Sabinians, asserting that the form alone was altered, assigned it to the original proprietor. On this subject Justinian adopted

a middle view, viz., that if the new article was capable of resuming its original form, it belonged to the original owner and *v. v.* The original owner, however, had his remedy in the latter case; for he could sue the appropriator, both in an *actio furti*, involving a penalty of four times the value of the thing stolen, and by an *actio ad exhibendum* (compelling him to produce it), that he may recover it or its value. But if part of the material belonged to the *specificator*, the new article became his, leaving the owner of the remainder his remedy as before; as, if one embroidered his own garment with purple belonging to another, he kept both, but was liable to the above-mentioned *actiones*.

If the materials belonged to two proprietors, and were combined by their joint consent, the combination belonged to both; if accidentally, and if either assumed exclusive possession, the other had his suit at law for compensation.

If a man built a house on his own land with another man's materials, the house was his; but the other, by an *actio de tigno juncto*, could recover twice the value of the materials; except the building was destroyed, when his action should be *ad exhibendum*. But, if a man built with his own materials upon another man's land, the house belonged to the landlord, as an *accessio*: but the builder had his remedy, for he could keep possession of the house until the landlord compensated him; unless he had deliberately encroached upon ground which he knew to belong to another; and, if it was taken down, he could

bring an *actio ad exhibendum*. If a man planted trees in the land of another, they belonged to the landlord as soon as they took root. If a man wrote on paper, or painted on canvass belonging to another, the MS. or picture belonged to that other; but Justinian, considering that the work of the author or artist might be infinitely more valuable than the paper or canvass, assigned the work to the writer or the painter, subject to payment for the material.

3. By *traditio*, which was the transfer of property from one to another, by sale, &c. It was necessary to the validity of this transfer that it must really belong to one party, and come by right, or for a sufficient equivalent, immediate or prospective, to the other, and that it should be made either by the proprietor or his accredited agent, either actually or virtually; for it was not always necessary that the thing transferred should be actually removed. A transfer might also be made to persons not ascertained, as when one throws money among a crowd; but, if property is abandoned, thrown away *without the intention* of resuming it, the first finder takes possession of it by *occupatio*. With respect to treasures found, the law ordained that if it was merely lost, it belonged to the loser; if lost for a long time, so that no owner exists, it belongs to the finder, provided he finds it in a place belonging to himself or to nobody; but if it be treasure found in another man's land, by accident, half belongs to the finder and half to the landlord; if purposely sought, all belongs to the landlord.

Under the Civil Law, property might be acquired in any of the following six ways: *mancipatio, cessio in jure, traditio, usucapio, adjudicatio,* and *lex.*

1. *Mancipatio* was a formal mode of delivery, accompanied by certain ceremonies, in presence of a salesman and five citizens as witnesses: the price and the thing sold were represented by a piece of brass (*æs*), and a portion of the latter, if it could be at all removed. The purchaser laid his hand on the latter, saying, *hunc ego hominem* (or whatever else it might be), *ex jure Quiritium, meum esse aio; isque mihi emptus est hoc ære æneâque librâ:* he then touched the scales with the brass before handing it to the seller. (Cf. Horace, Epist. ii. 2. 159.)

2. *Cessio in jure* was a fiction of the law, by which the property was claimed (*vindicabatur*) before the prætor, if in Rome, or the governor, if in the provinces, by the legal form "*hunc hominem* &c., *ex jure Quiritium meum esse aio;*" and the other party making no objection, the prætor *addicebat* the thing in question to the claimant.

3. *Usucapio* was a conventional license by which a person in possession of movables for one year, and of immovables for two years, became entitled to hold them permanently.

4. *Adjudicatio* was the assignment by a judge of property in dispute, among the claimants; as the partition of inheritances (*familia erciscunda*) of a property held jointly (*commune dividendum*), the settlement of boundaries (*fines regundi*), &c.

5. *Lex* signified the right established by law,

without coming into court, to take possession of certain things; such as legacies.

6. *Traditio* was a mode of informal delivery used in the case of things which were said to be *non mancipii; i. e.*, such as were not matters of sufficient value or importance to require all the forms of *mancipatio* or *cessio in jure* which were originally indispensable to acquiring possession under the Civil Law, which at first recognised but one sort of possession, the *dominium ex jure Quiritium.* The name *res mancipii,* on the contrary, included all things for the transfer of which those ceremonies were necessary, even by the law of the XII. Tables; and these things were, all lands and houses in Italy, or servitudes attached to them,—as the right of thoroughfare, the right of drawing water, all slaves and beasts of burden; and excluded all foreign and provincial interests,—for these came into question after the law of the *res mancipii* was fixed, and were the subjects of a more comprehensive legislation. Under this old law, therefore, foreigners could hold no property, as they could not say *ex jure Quiritium;* nor citizens, without those formalities. In order to remedy the inconveniences of this state of the law, the prætors found it necessary, on the extension of the empire, to introduce new provisions; which they did by protecting purchasers who had acquired property fairly and honourably, but informally, from the insecurity of possession to which the old law exposed them. Under the old law informal transfers were invalid, and the seller, who was still by law Quiritarian possessor,

could reclaim from the purchaser; until the prætors, by an enactment entitled *exceptio rei venditæ* or *traditæ*, directed that a verdict should not go for the plaintiff if it appeared that a sale and delivery in any actual form had taken place.

This new form of possession, which was signified by the phrases *in bonis habere* and *dominium bonitarium*, proved a considerable relief to the provinces; for, under the old law, neither foreigners nor even Romans could legally possess provincial lands, which were either regarded as belonging to the Roman people, as *stipendiarii*, or to the emperors, as *agri tributarii*, unless when they belonged to a city enjoying the *jus Italicum* (the social and political rights of Roman citizens extended to all Italy after the Social War). Justinian, however, finally abolished the distinction between Quiritarian and bonitarian possession, which had nominally existed down to his time, and ordained that there should be but one general form of ownership applicable to all *res corporales*.

The phrase "*bonâ fide possessor*" bears in Civil Law a different meaning from that which we now generally attach to it: it signifies one who has received and purchased a thing from another, whom he supposed to be, but who really was not, its possessor: he had therefore no rights, as against the original possessor, though he had himself acquired the thing honestly.

QUESTIONS.

What are meant by things within, and things not within our *patrimonium*?

How were things *intra patrimonium* classified?

What is the difference between things common and things public?

What is the difference between *res universitatis* and *res in patrimonio universitatis*?

How were *res nullius* classified?

Might *res sacræ*, under any circumstances, be applied to human uses?

How did places become *religiosi*?

How far were *res sanctæ* consecrated?

What were the elements constituting *dominium*?

Under the *jus gentium*, how many modes were there of acquiring possessions?

How many under the *jus civile*?

What things were acquirable by *occupatio*?

How did the *jus postliminii* bear upon the loss of certain possessions?

What do you mean by *accessio*?

What laws regulated and defined the rights of riparian proprietors?

How did *specificatio* affect the ownership of certain possessions?

What were the opinions of the Sabinians and Proculeians on these questions?

What remedy had the loser of property alienated by *specificatio*?

If one person used the purple of another to embroider a garment, how was the ownership of the combined materials defined?

How, if one man built a house with his own materials upon another man's land?

How, if on his own land, with materials not his own?

If materials belonging to two were blended, how did the ownership stand?

If not by common consent, but accidentally?

If a book were written on paper, or a picture painted on canvass belonging to another, how was the ownership defined by Justinian?

What was the position of a *bonâ fide possessor?*

What circumstances were necessary to constitute a legally valid *traditio* under the *jus civile?*

What were the laws relating to things abandoned and things found?

What were the formalities of *mancipatio?*

What were *res mancipii* and *res nec mancipii?*

By what ceremonies was *cessio in jure* effected?

What was necessary to constitute *usucapio?*

What was the difference between possession by *adjudicatio* and that by *lex?*

What were the inconveniences of the old law of Quiritarian possession?

How and when were these removed?

How was the law fixed by Justinian?

Title 2. — Of Things Corporeal and Incorporeal.

Things corporeal were defined to be those which were perceptible by the external senses (*quæ tangi possunt*); incorporeal were such as had no physical or material existence, *e. g.* privileges and obligations.

The several rights constituting ownership (*dominium*), and already enumerated, were sometimes capable of being enjoyed separately; for instance, *usus* and *fructus*, or either of them, might be enjoyed for a time without actual ownership, as when a man

hired a house or a farm: this was called a *servitus* personal. Again, lands or premises might be subject to certain *servitutes* in favour of other lands or premises; and this, which was permanently attached to such lands or premises, and not to individual occupiers, was called a real *servitus*.

QUESTIONS.

Define things corporeal and incorporeal.
How might the elements constituting ownership be divided?
What were real and personal *servitutes*?

Title 3. — Of the Servitutes Prædiorum Rusticorum et Urbanorum.

With reference to their *servitutes* — *prædia rustica*, in a restricted sense, signifies the soil; *prædia urbana* signifies premises generally; because, in the case of the former, the *servitutes* are connected with the soil (*in solo consistunt*), those of the latter are attached to the buildings (*ædificiis inhærent*).

The *servitutes pr. rusticorum* were, the right of passage, the right of drawing water, of watering cattle, of burning lime, of taking sand. Under the first of these were included *iter*, *actus*, and *via*: and of these, *iter* was the right of passing on foot, on horseback, or in a *lectica*; *actus* was the right to drive cattle or a vehicle, and of course included *iter*; and *via*, the use of the way for any purpose, and included the other two.

The *servitutes pr. urbanorum* were, the right to support one building by another (*oneris fundi*, or *tigni immittendi*); to raise or not to have raised a building to a certain height (*altius aut non altius tollendi*); and the right to receive or to decline receiving the flow of rain-water from a neighbour's roof (*stillicidii recipiendi vel non recipiendi*), — because, as every *servitus* involved a deviation from the ordinary conditions of property, it might imply the privilege of refusing to permit as well as the obligation to allow certain things to be done. *Servitus*, however, did not oblige one actually to do anything, but merely to allow it to be done by another; except in the case *oneris ferendi*, when there was an obligation to keep one building in a fit condition to support another.

Real servitudes (*servitutes in re*) were called *jura prædiorum*, because they were rights vested in some *prædia* over others, which should be always so relatively situated as to allow of the *servitus* being actual.

Servitudes in general were acquired by the same forms as Quiritarian ownership, *mancipatio*, &c.; with these exceptions, that rural servitudes only could be created by *mancipatio; usus*, *fructus*, and other personal servitudes, not being *res mancipii*, and urban servitudes, could be created only by *cessio in jure: usucapio*, by the *lex Scribonia*, did not apply to any servitude; nor did *traditio*, which was applicable only to things tangible.

These laws related only to lands in Italy: in the provinces, where no individual was legally regarded

as the proprietor, the formalities resorted to were *pactum* and *stipulatio*, which were an agreement to allow certain rights to be enjoyed, and an undertaking given in due form by question and answer to do nothing to prevent the exercise of such rights. These ceremonies created personal servitude and a right of action for its infringement.

In this case, as in that of acquiring property, the prætors obviated the inconveniences of the old law by recognising a *quasi-traditio*, by which servitudes, although not corporeal things, might be delivered, and creating an *actio in rem*, called *Publiciana* (after its inventor Publicius), which gave to virtual possession all the effect of legal; and when the reservation of any servitude out of anything transferred was made by *pactum* and *stipulatio*, they allowed it the same validity as it had under the old law in cases of transfer by *mancipatio* and *cessio in jure*. They also established a *præscriptio longi temporis*, which secured the permanent enjoyment of servitudes out of *urbana prædia* to parties who had already enjoyed them for a certain time. These prætorian rules were embodied in the law of Justinian, the effect of which was that servitudes were created, — 1. by agreements with quasi-delivery, or, when they were reserved out of transfers, without quasi-delivery; 2. by legacy, *i. e. lege;* 3. by *usucapio;* and 4. by *adjudicatio*. But agreements and stipulations, which can only create personal obligations, but not absolute rights, cannot of themselves, and without *quasi-traditio*, create servitudes.

Servitudes become extinct by the destruction of either the dominant or servient tenement; by *confusio*, when the same person becomes owner of both tenements; by a release; and by the disuse of the right for a time, which Justinian fixed at ten years for parties present, and at twenty for persons absent.

QUESTIONS.

State the distinction between *prædia rustica* and *prædia urbana*.

Of what rights did the servitudes of the former consist?

Mention the differences between *iter*, *actus*, and *via*.

What were the servitudes of *prædia urbana*?

Did a servitude always imply merely a concession?

Why are servitudes *in re* called *jura prædiorum*?

How were servitudes acquired?

How was the operation of *mancipatio* restricted in these cases?

Were provincial lands under the same law; and if not, why not?

How were these laws modified by the prætors?

What was the *actio Publiciana*?

What was *præscriptio longi temporis*?

How did Justinian regulate the law?

How might servitudes become extinct?

Title 4.—Of Ususfructus.

Ususfructus is the right of using (*usus*) and of enjoying a thing which is the property of another (because *nemini res sua servit*), without altering or destroying it (*salvâ rerum substantiâ*).

Usus (*jus utendi*) is the right to employ the services which a thing is capable of yielding, as the renting a house, the hiring a carriage, &c.

Fructus (*jus fruendi*) is the right to enjoy the fruits, products, or profits derivable from the thing in question.

The person having both these rights is an *usufructuarius;* but he can appropriate only such products as the thing is naturally intended to yield; and he must use them only as a proprietor would who had an interest in the preservation of the property. For instance, he must keep the number of cattle in a herd, or of trees in a garden, undiminished: and his privileges were understood to commence from the time when the fruits or products were capable of being used; so that if they were stolen or destroyed before that time, the loss fell upon the original owner.

Under the old law, an usufruct could be created by legacy, *cessio in jure*, and *adjudicatio*, but not by *emancipatio*, nor by *traditio;* for it was not a *res mancipii*, nor corporeal. But the prætors, as in other cases, amended the law by calling usufructus a *quasi-possessio*, and protecting it accordingly. Sub-

sequently, when provincial property was assimilated to Italian, an usufruct was understood to be created by legacy, by *pactum* and *quasi-traditio*, by *adjudicatio* in suits for partition, and by occasional interpositions of established law.

By legacy, an usufruct, which of course could be derived only from such things as would not be consumed by using them, might be created in either of three ways: 1. by leaving the usufruct to one, and the bare proprietorship to another; 2. by leaving the property, and reserving (*deducto*) the usufruct, which then belonged to the *hæres;* and 3. by leaving the usufruct to one, and the property, with that express deduction, to another: but the deduction should be express; for otherwise the usufruct, which was implied in the possession of the property, might be supposed to be divided.

By a *senatusconsultum*, under Augustus, a *quasi-ususfructus* was created in things perishable by use, with an obligation on the *usufructuarius* to restore, at the time when an usufruct would expire, an equivalent in kind or in money.

The quasi-usufructuary was required, by the *senatusconsultum*, and the usufructuary, by the Prætorian Law, to give their own security, together with a *satisdatio* (already defined), that they would enjoy as a *paterfamilias*, and restore at the expiration of the tenure.

An usufruct was understood to expire on the death of the usufructuary, except he happened to be a *filiusfamilias* or a slave (in which case, by the law

of Justinian, it continued for the *paterfamilias* or the master during his life); by *diminutio capitis*, *maxima* or *media*, by Justinian's law; and by disuse of one year for movables, of two years for immovables,—which was extended by Justinian to three years for movables and ten years for immovables, if the time ran against persons present, and twenty years if against persons absent. The usufructuary could transfer the enjoyment of his right for his own tenure of it to another, but could not alienate his obligation. It might also expire by *consolidatio* (*i. e.* when the usufructuary became the proprietor), and by the destruction or change of substance of the thing enjoyed; for instance, by the razing a house. But if it was vested in more than one person, on the death of one it continued among the survivors.

QUESTIONS.

Define *usus* and *fructus*, marking the distinction between them.

Did *fructus* include all the products of the thing in question?

What were the obligations of an usufructuary?

When was an usufruct supposed to commence?

How was it created at different times?

In how many forms, by legacy?

From what things only was an usufruct understood to be derivable?

What was the difference between an usufructuary and a *quasi*-usufructuary?

What security was required of these respectively, and for *what purpose?*

When did an usufruct expire?
What was the limitation of the period of disuse?
How far might it be alienated?
What was *consolidatio?*

Title 5.—Of Usus et Habitatio.

The bare use (*nudus usus*) was a privilege of little value, strictly interpreted, being *sine fructu;* but in some cases it was understood with more or less latitude, and allowed to include more or less of the *fructus,* particularly in the case of legacies, which were more open to constructive interpretation than agreements *inter vivos.* It was not capable of assignment to another party, which might be a *fructus* in some sense; for instance, one having the *usus* of a house could not sublet it, nor could he lend or hire his use of a slave or a horse, &c., though he might in some cases let part of a house of which he had the use.

Usus might be created by the same formalities as an usufruct, except *adjudicatio* and *lex,* and expired also under similar circumstances.

The exact nature of *habitatio* has not been definitely ascertained; it appears to have been some species or modification of *usus* or *fructus,* consisting of a series of rights arising from day to day, and was allowed by Justinian to be let.

QUESTIONS.

What rights were included in *nudus usus*?
How was it rendered virtually advantageous?
Under what circumstances was it alienable?
How did it arise and expire?
What was *habitatio*?

Title 6.—Of Usucapio, and Possessiones Longi Temporis.

Usucapio was a mode of acquiring property, under the Civil Law, by being in possession for a certain time,—which was one year for movables, and two years for immovables. Its object was to assimilate bonitarian to Quiritarian possession, and to secure and perpetuate the rights of *bonâ fide* proprietors; and it applied to movables everywhere, and immovables in Italy (for provincial lands were public property): but here again the prætors interfered in behalf of provincial proprietors, by granting a *præscriptio longi temporis* to *bonâ fide* possessors after ten years of possession, in cases where possessor and proprietor lived in the same province, and twenty years when in different provinces; such *præscriptio* having the effect of barring any action of the proprietor and of all other claimants of servitudes, &c., and being so far preferable to *usucapio*, as it transferred property free from claims or incumbrances. This *præscriptio*, as its name implies, was

an order addressed by the prætor to the *judices*, not to proceed, in cases where the conditions of time had been fulfilled.

As Justinian assimilated Quiritarian and bonitarian possession, and the condition of Italian and provincial property, and amalgamated the laws of *usucapio* and *præscriptio temporis*, it came to pass eventually that there was but one mode of acquiring property by remaining in possession, requiring a tenure of three years for movables, and ten or twenty for immovables.

It did not, however, apply exclusively to things corporeal; for servitudes might be abolished by holding property as free from them, for a certain time, though they could not be established in the same way.

The conditions necessary to the creation of this right were, that the possession must be virtual, and not merely nominal, that it must have been taken *bonâ fide* and by rightful title (*justâ causâ* or *justo titulo*), that it must have lasted the proper time, and relate to things *non vitiosæ*.

Justa causa or *justus titulus* signifies any contract, or understanding, or circumstance authorising as according to law the taking possession,—such as a sale, a gift, a marriage settlement, payment of a debt, *occupatio rerum nullius*, &c.; and in these cases the holder was said to take possession *pro emptore*, *pro donato*, *pro dote*, *pro soluto*, *pro derelicto*, *pro suo*, &c. But if he was mistaken as to any of *these circumstances*, supposing it to be real when it

had no existence, the grounds of his error were taken into consideration: viz., if the circumstances were such as he could not have known personally, it was excused, and he was protected; with this exception, that ignorance of the law was never recognised as a valid excuse.

In order to fulfil the conditions of the law as to time, it was necessary that it should have been uninterrupted during the whole of the specified period, either by natural or civil intermission, *i. e.* either by the holder's own act, or by any legal action against him (such interruption being called *usurpatio*); and that possession should have been taken in the first instance, though not continued *bonâ fide:* but it was not indispensable that it should be continued in the person of the same individual; its continuation in the persons of heirs or other representatives was sufficient.

Res vitiosæ were understood to be all things incapable of being bought, or sold, or otherwise alienated, such as *res sacræ*, or *religiosæ*, or *publicæ*, freemen supposed to be slaves, marriage portions if immovable, things stolen, things taken by violence, and things belonging to the emperor or the imperial treasury. Fugitive slaves also were *res vitiosæ*, because their flight was regarded as a theft.

It will be perceived that the application of this mode of acquisition to movables was very limited; the only cases in which such property could be made subject to it being such as those wherein an heir *sold a thing* which had been lent or hired to the

testator, or where the usufructuary of a slave sold the slave's child, believing it to be his property: in these cases the purchasers acquired legal titles, because there was no fraudulent intention. It will be also perceived that immovables must be more generally acquirable in this way than movables, as being less liable to be stolen or removed by violence. For the *vitium* arising from theft or forcible removal, however, there existed a remedy in the recovery of the property by the original proprietor, and its delivery by him to the *bonâ fide* possessor, provided such recovery was not effected by purchase, and, according to a Novel of Justinian, in the cognisance on the part of the original possessor of the transfer of property by a *bonâ fide* possessor to a third party.

According to the Constitutions of the Antonini and Severus, *bona vacantia* (properties of those who were represented by no successors), although they were *res fisci* or *ærarii*, might be acquired by individuals until they were formally claimed by the agents of the treasury.

In addition to the *præscriptio* already defined, there were others still: one called *longissimi temporis*, established by Imperial Constitutions, and securing the possession even of *res vitiosæ* after a tenure of thirty years, and of *res sacræ* or *publicæ*, or belonging to minors (and therefore not legally transferred), after a tenure of forty years, but not giving the possessor the right of *actio* if he lost the property. To this Justinian added the privilege of transferring, if possession had been originally taken *bonâ fide*. And

further, a Constitution of Marcus Aurelius secured even *malâ fide* possessors of public property against actions *in rem* of the proprietors, after five years' tenure: in this case it was decreed by Zeno that purchasers from the Fiscus held the property from the beginning, released from all incumbrances and proprietors' claims, with a reserved right to these latter of action against the Fiscus; which enactment was extended by Justinian in favour of purchasers from the household of the emperor or empress, and may be regarded as an exception in favour of these establishments.

QUESTIONS.

What were the nature and objects of *usucapio?*

Did it apply to all sorts of property, and what were the exceptions?

What modifications in the law were made by Justinian?

What was the *præscriptio longi temporis*, and what the *longissimi temporis?*

What antecedent conditions were necessary to the validity of this sort of title?

What do you mean by *justa causa*, or *justus titulus?*

Were these conditions invariably necessary?

What constituted a continuous possession?

Does continuous possession necessarily imply that of the same one person?

What were *res vitiosæ?*

Were these excluded in all cases?

Why were movables more likely to be *vitiosæ res* than immovables?

Was there any remedy for certain kinds of *vitium?*

What were *bona vacantia?*

What privilege had the *fiscus* and *domus imperatoria* in the capacity of vendors?

Title 7. — Of Gifts.

Donatio properly and literally signifies the act or circumstance of giving. Under the old law the expression of the intention, that is, the promise to give anything, was not of itself binding, but required a formal transfer of the thing given subsequently. A *stipulatio* was held to be sufficient to compel the donor to complete the gift; and eventually the Christian emperors, particularly Justinian, dispensed with the *stipulatio*, and substituted the mere promise or agreement, which, however, was required to be evidenced by witnesses, by writing, or by (*insinuatio*) registration.

Donatio was not at first a special mode of acquiring property, for it required confirmation by the formality of *mancipatio* and other modes of transfer; but afterwards, when accompanied by registration and other confirmations, it was virtually a legal form, particularly the *donatio mortis causâ*, which was a sort of legacy,—being a gift which was to take effect after the death of the donor generally, or his contingent death on some particular occasion; and was revocable in both cases, either by change of purpose or failure of conditions. There were some differences and some resemblances between these *donationes* and legacies, *viz.*, that although both were revocable and void if the giver survived, both set aside by insolvency, both liable to the deduction of the Falcidian fourth (to be hereafter

defined), and both taking effect under the standing provisions of the law, yet the *donatio* did not, like the legacy, depend on the nomination of a *hæres institutus*, which was necessary to the validity of a will; it required a capacity to receive at the time of the donor's death, not necessary in the case of a legacy; and it sometimes transferred during the life of the donor. But Justinian very nearly assimilated them (*per omnia ferè*) by holding the *donatio mortis causâ* to be valid without registration or writing, when attested by five witnesses.

A *donatio inter vivos* was essentially irrevocable, except in the following cases:—of ingratitude, in which case, however, the right to revoke does not descend to the heirs of the donor; of the birth of a child to one who had given his property to a freedman; and of the nonperformance of a promise to marry, when the ante-nuptial present, made as a security for the *dos*, was returned. These donations *inter vivos* were legalised by Justinian on a principle analogous to that of his other reforms: he dispensed with registration for gifts not exceeding 500 *solidi*, without, however, annulling such gifts when unregistered, but reducing them to the amount at which they would be valid without registration. There were also two other innovations in the law of gifts made by Justinian: he established, in the first place, the *donatio propter nuptias*, allowing the *donatio nuptialis* to be given after marriage, whereas under the old law it was held that no gift could be made by a husband to his wife, or *vice versâ*; and, in the

second instance, while the old law enacted that, if one of several proprietors of a slave emancipated him, the emancipation was null, and the interest of that proprietor vested in the others by the *jus crescendi*, he arranged that the slave should become free, but that the nonenfranchising owners should receive compensation for the loss of his services.

QUESTIONS.

How did the law vary, in course of time, with respect to gifts?

Was *donatio*, at any time, a *special* mode of acquiring property?

How many forms might *donatio mortis causâ* assume?

How did this resemble and differ from a legacy?

How was *donatio inter vivos* confirmed by Justinian?

In what cases was it regarded as revocable?

What was *donatio propter nuptias?*

Can you mention any other reform made by Justinian in the law of *donatio?*

Title 8.—Of the Power to alienate.

Although the power to alienate might naturally seem to be vested in the proprietor alone, there are, however, proprietors who have not that power, and others, not proprietors, who have; for instance, minors, though proprietors, could not, as has been already explained, alienate their properties; nor could husbands alienate the lands forming their *wives' portions* (*prædia dotalia*), nor place them

under mortgage (*hypotheca*), even with the wives' consent; and Justinian afterwards confirmed this prohibition, on the assimilation of *alienatio* and *hypotheca*, and of the condition of Italian and provincial lands. The intention was to secure to wives the restitution of the *prædia dotalia;* and therefore the alienation was null only in cases where restitution was claimed by themselves or their representatives.

Pupilli (minors or wards) also, though proprietors, were unable to alienate by their own act; and this incapacity affected loans made, payments received, and debts paid by them. In the first of these three cases no loan was legally effected, because nothing was legally transferred, and the *pupillus* could not sue for restitution as of a loan properly so called (*mutuum*, to be hereafter defined), but as a proprietor by an action *in rem*, if the thing lent still existed, or by a *condictio* to enforce compensation, if it was consumed. In the second case the *pupillus* had no power to alienate his claim, and therefore the debtor was not legally discharged, and might be sued again; but, on a principle of equity, he was generally protected by the prætor: but if the debt was paid to the guardian or with his concurrence, then the debtor was free and the guardian accountable; if, however, the guardian proved insolvent, the Prætorian Law restored the *pupillus* to his original position (*in integrum*) as a creditor, and, by the law of Justinian, the debtor was again protected. In the *third case, that of* debts paid, the act was invalid

for the same reason as before, and the minor might still sue for payment; but, if he did, he was *restitutus in integrum*, and again became a debtor.

The cases in which persons, not proprietors, might alienate, were those of guardians and curators, who were restricted with regard to *prædia rustica*, which they could not alienate without the sanction of a magistrate; and the case of a creditor, who might dispose of a pledge given him to secure his claim, but not without notice given, and forms under the Justinian Law complied with. In this instance it must be observed that the creditor only used a power transmitted to him from the original proprietor.

QUESTIONS.

In whom was vested the power to alienate?

What apparent anomalies did the law on this subject present?

What was the object of preventing a husband from alienating a *prædium dotale*?

A *pupillus* was incapable of alienating. — What acts of his were thereby invalidated?

How were the inconveniences resulting from the invalidity of these acts obviated?

What persons might legally alienate, without being proprietors?

On what principle, and under what restrictions?

Title 9. — Of Acquisitions.

In addition to their own personal acquisitions, Roman citizens possessed the privilege of also enjoying the acquisitions of *filiifamiliarum* and slaves; because it was understood that in each family there was but one *patrimonium*, and the private possessions of its several subordinate members were therefore held by them merely by permission of the *paterfamilias*. In course of time, however, this law was modified, and the existence of *peculia* recognised, which were portions of goods distinct from the general *patrimonium*. The *peculia* of sons of families were of four denominations: 1. The *castrense*, including everything acquired by or for military service; 2. the *quasi-castrense*, all complimentary acquisitions, such as presents from the emperor, &c., and everything acquired by civil or ecclesiastical duties; 3. the *profectitium*, comprising all that the son acquired out of the father's *patrimonium*; 4. *adventitium*, including all gains from all other sources. Of all these the only one over which the father claimed any right was the *profectitium*: of the *adventitium* he enjoyed the usufruct only, the bare property being reserved to the son, so that eventually he might possess both; and even this usufruct he lost in cases of emancipation, under the old law; but the Constitutions allowed him to retain a third of the *adventitia*, for which Justinian substituted the usufruct of half.

The position of slaves was different; for, as they

had no personal rights, all that they acquired, in any way, belonged either to their masters, or the persons to whom their masters had transferred them, such as usufructuaries; and when a slave belonged to several masters, his acquisitions went in shares among them, in the proportion of their several interests in him; but, when a slave was about to acquire anything as a *hæreditas*, which involved obligations as well as rights, it was necessary that he should obtain the master's consent; and, in the case of a divided mastership, if one party dissented, the consenting party, by the law of Justinian, enjoyed the advantages and incurred the responsibility.

Though it was understood that the master acquired the acquisitions of his slave unconsciously, there were some rights, as those of possession (*usucapio* and *præscriptio*), which, as he could not in reality acquire unconsciously, he was supposed by a legal fiction to exercise without his cognisance; as, when the slave was intrusted with the management of a *peculium*.

The usufructuary of a slave was entitled only to the profits intended to result to him as such, viz., the products arising from the slave's industry (*ex operibus*), or from the property intrusted to him (*ex re fructuariâ*): all other acquisitions, such as gifts or legacies, belonged to the master. The rights of a *bonâ fide* possessor were similarly restricted, with this difference, that the usufructuary could never by *usucapio* become the possessor of the slave, because he never had the actual possession to begin with, and, by becoming an usufructuary, admitted that he had not.

Filiifamiliarum and slaves were the only persons who, in their own names, acquired for others; for any man might acquire for another, in the name of that other, though the possession did not actually vest in him until he was aware of the fact, — except in the case of a procurator, all whose acts, whatever they might be, were recognised beforehand.

QUESTIONS.

In what way might a Roman citizen acquire property indirectly?

What were *peculia*?

Of the different sorts of *peculia*, which were the actual property of those who had acquired them?

What difference existed between *filiifamiliarum* and slaves, as to their personal acquisitions?

Were there any other rights beside those of tangible property acquirable indirectly?

What was the usufruct of a slave understood to imply?

What was the essential difference between acquisitions made in this way, and those made by an agent?

Title 10. — Of Legacies.

The changes which the progress of time and the increasing wants and relations of society rendered necessary in other departments of the law, were of course extended to that of legacies, and gradually removed the cumbrous and formal restrictions which, for a considerable time, attended the making of wills; and of which the most inconvenient must

have been the publicity which was required to give validity to the deed, and appears to have arisen from the spirit of exclusiveness that animated the small communities of very ancient times,—every citizen of a state being regarded, in some sense, as a member of a large family, and performing no act affecting any other member without the cognisance of all.

Under the old law, therefore, wills were made with the same publicity as laws, in an assembly called the *Comitia Calata*, convened twice a year for that purpose; and upon any of the frequent occasions of going to war, when it was necessary to make such arrangements without waiting for the regular time, the same principle was still carried out by making wills in a similarly solemn form, in presence of the whole army, which was called the *testamentum in procinctu*. Another form, founded on the principle that no single individual could, by his own disposal and without public sanction, interfere with the natural and legitimate order of succession, which was that of keeping property permanently in the same families, was the formal mode of transfer *per æs et libram;* in which the heir represented the purchaser, and one of the six witnesses acted as *libripens*, so that the property to be left by will passed through the ceremony of being sold. The first reform was effected by the Law of the XII. Tables, which gave to every man formally and legally the right, which he had always virtually enjoyed, of making such testamentary disposition of his property as he pleased,—still retaining, however, the form, but only the form.

of the obsolete *mancipatio*, and giving to the new mode the title of *nuncupatio* (declaration): and this form continued under the Civil Law, down to the time of Theodosius II. and Valentinian III., concurrently with another and more convenient mode, recognised by the Prætorian Law, which established the validity of any will made in presence of and bearing the seals of seven witnesses.

At length the emperors, following up the views adopted by the prætors, abolished the old forms, and established a new mode of testament, for which the following three conditions were essential: that all the formalities, from beginning to end, should be completed continuously (*imo contextu*); in the presence of seven witnesses, specially met for the purpose; and attested by their signatures inside, and their seals outside the document: and, as these three elements had been adopted respectively from the Civil, the Prætorian, and the Imperial Laws, the form was distinguished by the name *tripartitum*. An addition made by Justinian, but subsequently repealed by a *Novella*, made it necessary that, in order to prevent fraud, the name of the heir should be written by the testator himself, or by one of the witnesses.

In all these cases, the natural principle of succession was so fully recognised, especially by the old law; that it was indispensable to the validity of a will, that some one heir should be named as the representative of the testator, succeeding to all his property and all his liabilities (among which latter were included the subordinate legacies bequeathed to

other persons); and in the absence of this arrangement, the law interfered, and invested the heir presumptive with the inheritance. It will be perceived, that, in this way, the two principles, the *hæreditas testamentaria* and the *hæreditas legitima*, altogether excluded each other, and that no disposition by a will of part only of a property was valid.

Under the old law, as it may be reasonably presumed, none were capable of being witnesses to a will who were not also capable, politically and physically, of taking part in the ceremonies by which it was sanctioned, and therefore all foreigners and *prodigi* under interdict, and, of course, slaves, were excluded, because none of these had the faculty called *testamenti factio, i. e.* they could neither receive nor dispose of property by will. But, at all periods of the law, minors, lunatics, deaf and dumb persons, *prodigi* under interdict, persons under *infamia*, slaves, members of the same family with the testator, and of the same family with the *hæres institutus* (including himself), were all considered disqualified. It may be also necessary to observe that it was under the more recent forms of the law that wills appear to have been actually written, because, during the prevalence of the old law,—a time when very little was written on any subject or for any purpose,—the transfer of property by *mancipatio* was altogether unaccompanied by writing.

QUESTIONS.

What were the several forms of making wills recognised by the old law?

On what principle were wills made *per æs et libram?*

What modifications were introduced by the Law of the XII. Tables? and how were the several forms simplified by the prætors?

By whom was the *testamentum tripartitum* introduced, and why was it so called?

What reform was introduced by Justinian?

What persons were disqualified from being witnesses to wills under the old law and the Imperial Law?

What do you mean by the terms *testamenti factio*, *nuncupatio*, *hæreditas testamentaria*, and *hæreditas legitima?*

Title 11.— Of the Wills of Soldiers.

The spirit of the Imperial Laws generally being convenience and expediency, it may be naturally expected that persons exposed to the many emergencies of military life should be exempted from the strict formalities of the law; and accordingly the wills of soldiers, while in actual service and in the camp, were considered to be valid (*perfectissima*) in any form, provided only they were sufficiently attested to show the obvious intention of the stators; and, for this purpose alone, it was necessary that a soldier should call upon some witnesses to hear his declaration or attest his signature. Wills made in this extempore manner were valid for one year

after the testators had returned home, provided they left the army regularly and honourably; but if they survived that period, the regular forms were necessary to validate their dispositions. It did not follow, however, that wills thus irregularly made by citizens at home were confirmed by their subsequently becoming soldiers, unless they were expressly recognised by the testators, by making some addition or alteration, which was virtually making a new will. Soldiers also were not affected by *diminutio capitis*, except it was *maxima* or *media*, similarly with other citizens in this respect, for their wills were still valid; and *filiifamiliarum*, who could not otherwise make wills at all,—except under the Imperial Law, and then only with respect to their *peculium castrense*,—were allowed, while under arms, to become testators.

QUESTIONS.

How did the law of testaments affect soldiers?
Were any formalities necessary in their case?
How long did such wills continue valid?
How did *diminutio capitis* affect the *testamenti factio* of a soldier?

Title 12.—Of Testamenti Factio.

The combination of circumstances and conditions constituting the right and the power to make a will was called *testamenti factio;* and without this, even though all the necessary formalities had been com-

pleted, the will was invalid. The law did not originally recognise this capacity in any persons but *patresfamiliarum*, and not even in these, if they were minors, or lunatics, or *prodigi*, or deaf and dumb, at the time when the will was made; for any incapacity subsequently arising could not, either in reason or in law, be supposed to invalidate. It was also considered a disqualification, if a Roman citizen became a prisoner of war, and, by assuming the condition of a slave, forfeited his *status* as a Roman.

All these enactments, however, like those treated of above, underwent certain modifications. The *testamenti factio* was, by the law of Justinian, extended to *filiifamiliarum* with reference to *peculium quasi-castrense*, as the *castrense* had been previously exempted by Augustus, Nerva, and Trajan. Justinian also qualified deaf and dumb persons as testators, on observing certain forms, and provided their infirmity was accidental and not congenital; and persons reduced to slavery were permitted, if they returned, to resume, by the *jus postliminii*, their former *status*. Under any circumstances the *lex Cornelia* (A. U. C. 686) supplied a legal fiction to validate their wills, by supposing that they had died immediately on the loss of their liberty, and thus (as well as by the *jus postliminii*) altogether ignoring their slavery.

QUESTIONS.

In what persons exclusively did the law originally recognise *testamenti factio?*

To whom was it subsequently extended?

Were all wills made by disqualified persons invalid?

Persons reduced to foreign slavery were disqualified:—how were their disabilities relieved?

Title 13.—Of the Exhæredatio of Children.

On the principle of succession recognised by the law, children were considered so far the natural successors and representatives of the *paterfamilias*, that it was supposed that his property rather remained among them at his death than descended to them by bequest; and it was accordingly required by the law, that, for a *paterfamilias* to leave his property to a stranger (*extraneo*), he should first formally disinherit his children. But, even this he could not altogether effect; for, although expressly *exhæredatio*, they were still entitled collectively, by the Law of the XII. Tables, to one-fourth of his property (the *quarta legitima*); and in order to prevent him from carrying any such intention into effect indirectly, by making them *hæredes instituti*, and encumbering them with other legacies to such an extent as to render the inheritance merely nominal, the *lex Falcidia* still interposed to secure their fourth under any circumstances. But the law on this point was expanded into numerous ramifications. If the son so disinherited died before the will came into operation, the will was still invalid, because it was originally so. If the will was conditional, and if the

son died before the time for the fulfilment of the conditions, the will was void, because the son could not be regarded as having been either *institutus* or *exhæredatus* during his life, and therefore never at all. The case was different when daughters or more remote relatives were disinherited irregularly, that is, not mentioned at all in the will,—for then the will was not set aside; but they were entitled collectively to one-half the inheritance if the *hæres institutus* was a stranger, or, if more than one *hæres* was appointed, though members of the family (*hæredes sui*), to an equal share with each of them (*pars virilis*); for instance, if there were two *hæredes instit.*, they came in for one-third of the whole inheritance. This right was called the *jus accrescendi*, and, in the case of grandchildren, belonged only to those whose father had died previously, because during his life he stood between them and the grandfather. The precedence which the law gave to a son was further indicated by the fact that a son should be disinherited by name, while daughters and grandchildren might be excluded as *cæteri*. It was also necessary to make provision for or disinherit posthumous children, if they were so related that they would, if born previously, have been *hæredes sui*, because, by a fiction of the law, devised in their favour, they were supposed to be born at the time when the will was made; and the *lex Junia Velleia* (A. D. 10) further provided that children, born, or otherwise becoming members of the family, between the making of the will and the death of the testator,

should be entitled to the same rights. The wills of soldiers and of maternal ancestors, however, were not liable to so much strictness of interpretation: in both these cases mere silence, without any express exclusion, was sufficient to disinherit; in the soldier's case, because formalities in general were a secondary consideration, and in the mother's or grandmother's case, because children were *hæredes sui* only of their father's family. It may be necessary to add that emancipated children, who sometimes resumed their relationship on the father's death, and children by adoption, enjoyed similar rights to those of the *hæredes sui;* and that eventually Justinian, taking his usually comprehensive view of the law, abolished all distinctions between all children and grandchildren, so that the omission of the name of any was fatal to the validity of the will.

QUESTIONS.

On what principle was it necessary to disinherit children in express terms?

Could this be effected? Could their natural rights be altogether, directly or indirectly, set aside?

How did the position of sons and daughters differ with reference to these rights?

Had children not yet born any rights of inheritance?

What was the position of adopted and emancipated children?

How far did these laws apply to the wills of soldiers, of mothers, and maternal ancestors?

Title 14.—Of Institutio Hæredis.

The nomination of one *hæres institutus*, or of several, whom the law regarded as the representatives of the testator in all matters relating to his property and its liabilities, as already stated, was a condition upon which the validity of every will depended; and in order that such *hæres* or *hæredes* should fully represent the testator, it was necessary that the whole inheritance should be left to him or them; or, as the law expressed it, no man could be partly testate and partly intestate. All persons, however, were not legally eligible as *hæredes instituti*. The old *leges*, with their customary strictness, limited the qualification to Roman citizens exclusively; and even from this number women were excluded, so far as the inheritances of persons in the first class of the census (of Servius Tullius) were concerned. This law (*Voconia*) was repealed by Justinian; but apostates and heretics he excluded. Slaves, as such, were also disqualified, but they might be appointed, and in that case became freedmen, because, although the old laws required that the intention to bestow liberty should be expressly stated, it was decided by Justinian that such nomination should be a virtual manumission. Unmarried persons, and those who, though married, had no children, were likewise disqualified, though they might, by the laws *Julia* and *Papia Poppæa*, enjoy the empty compliment of being *nominated*. With respect to the nomination of

slaves, the law contained a vast number of minute provisions: for instance, a slave, when nominated, becomes free and the *hæres*, if he remains in the testator's service until his death; but if he be alienated in the meantime, or if one nominates another man's slave (which is virtually the same thing), he can accept the inheritance only with the consent of his master for the time being. If he belonged to several masters, he could accept the *hæreditas* only for their benefit, without thereby acquiring his freedom.

When several *hæredes instituti* were named,—for a testator could name as many as he pleased,—and if they were appointed jointly, and not to succeed each other in reversion, it was usual to specify the several shares in which the property was apportioned, by *unciæ*. Now an *uncia* was properly the one-twelfth of anything; but in this case it appears to have lost by usage that precise signification, and to have conventionally stood for any denomination of a fraction, the value being inferred from the number indicating the numerator: thus, if three *unciæ* are bequeathed to each of three heirs, it follows, from the fact that no testator could be partly intestate (except a soldier), that we must take an *uncia* to signify one-ninth; or, if five heirs are named, and three *unciæ* given to each, we must understand by the *uncia* one-fifteenth, &c. If heirs are named and no shares specified, it is of course inferred that they divide the inheritance equally between them; but, if the shares of some are specified

and of others not, a calculation must be made on the same principle: for instance, if twelve *unciæ* be left to one heir and no stated sum to the other, it is assumed that the *hæreditas* consists of twenty-four *unciæ*, of which each takes twelve. In some cases, however, an inheritance was said to consist of two or three units containing twelve *unciæ* each, when it was called *dupondius* or *tripondius* accordingly. Conditional nominations also were a question into which the law entered very minutely Conditions relating immediately to time were not recognised by the law; that is, an heir could not be appointed to come into possession after or from a definite period, because such an arrangement would be equivalent to an intestacy during the preceding or succeeding interval. In order to avoid this, and to carry out to the fullest extent the wishes of testators, the law interposed its remedy, and, instead of making such dispositions void, held them to be absolute. The view taken of other conditions was different; because, where the condition was indefinite as to time, and where it might at any moment be either fulfilled or become impossible, the possibility that the disposition founded upon it may sooner or later take effect, was sufficient to exclude the *hæredes legitimi* for the time; and during such interval, not the *hæres institutus*, but the *hæreditas* itself was regarded by the law as the representative of the testator.

QUESTIONS.

On what principle was an *institutio hæredis* indispensable to the completeness of a will?

What persons only did the old *leges* recognise as *hæredes instituti?*

What classes of persons were always excluded?

What was the consequence to a slave of such a nomination?

What further regulations were made respecting the *institutio* of slaves?

On what system was it usual to indicate the shares into which a property was distributed?

What was signified by the terms *dupondius* and *tripondius?*

When an *institutio* was conditional, what difference was observed between postponements for definite and indefinite intervals?

During an interval of intestacy, who represented the testator?

Title 15.—Of Substitutio Vulgaris.

In order to avoid, as far as possible, the contingency of being intestate, against which every precaution was taken by the Roman law, it was usual to nominate provisional heirs in case the regular *instituti* should fail or refuse to accept: this arrangement was called *substitutio,* and was of three kinds,—*vulgaris, pupillaris,* and *quasi-pupillaris* or *exemplaris.* The first of these, which is the subject of this title, was that disposition by which a series of heirs were nominated, of whom the second took the place left vacant by the first, and the third suc-

ceeded in case the second failed; and, to guard against any possibility of intestacy, a slave was generally nominated among the number, because he would have no power to refuse the inheritance (being *hæres necessarius*), which the others might decline, if they apprehended that the *hæreditas* would be insolvent or otherwise unprofitable. This *substitutio* might be arranged in various forms: several *substituti* for one *institutus*, or *v. v.*; or a *substitutus* for each one of the *instituti*; or the *instituti* might be substituted for each other. In the latter case it was arranged that the death of an *institutus*, occurring between his acceptance of the *hæreditas* and the time when it vested in the heirs, would render his share vacant, for the benefit of the surviving heirs; and this share, so vacated, was divided between them in proportion to the relative amounts of the shares originally assigned to them. Shares which became vacant before the testator's death, and between his death and the opening of his will, were called *partes caducæ*, and *quasi-caducæ*, respectively.

QUESTIONS.

What was *substitutio*; and what was the object of the arrangement?

How many forms did it assume?

What was the particular motive for nominating slaves?

Was the order of succession definite or optional?

When shares became vacant, how were they disposed of?

Title 16.—Of Substitutio Pupillaris.

On the principle of guarding against the intestacy which would result from the death of a minor who was entitled to property, it was usual, as he could not, in his own person, become a testator, that his father should appoint a *hæres substitutus*, to represent him in case he should die before attaining the age at which he would be *sui juris*. Such a will might be either included in that of the father or made separately; and might be made for any son or more remote descendant who would, on the testator's death, become *sui juris*, whether such descendant was his own *hæres institutus* or disinherited. But, in order to obviate any danger which might possibly result to the minor from its being publicly known who was his *hæres substitutus*, and had, therefore, an interest in his death, it was usual to keep such portions of wills secret from even the witnesses who attested the signature of the testator. Wills of this sort might be made for *filii adrogati*, as well as for the father's own children; but they could not affect any property except that derived from the *pater adrogator:* all other property went to those who would be, in any case, his natural representatives, if he died a minor.

Substitutio pupillaris was of course annulled, either by the maturity of the *pupillus*, who could then make his own will; or by the validity of the paternal will in which it was included; or by the death

of the *pupillus*, in which case his capacity as a testator had never existed; or by any *diminutio capitis* of the minor, which, if it occurred before the father's death, abolished the *patria potestas*, if afterwards, the citizenship, of the minor. And, if the father's *hæres institutus* was a stranger or son of mature age, there could be no *substituti* for other members of the family who might become *hæredes*, and die within a certain period: such *hæres inst.* could be bound only by a *fideicommissum*, as a trustee, to assign a portion of the inheritance to any third party.

The *substitutio quasi-pupillaris* was that of *hæredes* to lunatics, not minors, in case they died before recovery; and, unlike the *pupillaris*, might be made by any ancestor in the male or female line, as well as the *paterfamilias*, but should be made in favour of the immediate relatives of the lunatic.

QUESTIONS.

What was the nature and object of *substitutio pupillaris*?

Was it necessary that such a disposition should form a distinct document?

What precaution was generally taken by the father of a minor in these cases, and against what danger?

What peculiarity was there in the *substitutio* made by a *pater adrogator*?

How might a *substitutio pupillaris* be annulled?

What was *substitutio quasi-pupillaris*, and how did it differ from the *pupillaris*?

Title 17.—Of the Avoidance of Testaments.

Notwithstanding the number and solemnity of the formalities by which wills were secured, it was still possible, even when all these were fully completed, and the will was (*jure factum*) valid in its creation, that it might be rendered void by events occurring subsequently, either by the birth or accession in any other way of additional heirs, or by the act of the testator revoking one will without making another, in either of which cases it was said to be *ruptum;* or by a change occurring in the *status* and powers of the testator, in which case it was said to be *irritum.* With respect to the first of these two cases, there were several subordinate regulations made by the law. In the first place, it was arranged—as indeed reason and common sense would suggest—that a second will always superseded the first, even without any express revocation; and even if it confirmed the first, that was regarded as a codicil (defined hereafter), and the provisions of the second as a *fideicommissum*, in which case the *hæres inst.* became entitled to a "Falcidian fourth." It was also possible to break a will by a public or attested declaration of the testator's intention; which, however, could not take effect for ten years after the will came into operation. From the definition of an *irritum testamentum* given above, it will of course be inferred that a *diminutio capitis* was the cause; but it is necessary to add that the testator, on regaining his *status*, was obliged to renew the

validity of his will by a second ceremony of sealing, which was in fact equivalent to making the will over again.

QUESTIONS.

Was a will formally and regularly made (*jure factum*) invariably valid?

What was the difference between a *testamentum ruptum* and a *testamentum irritum*?

Did a second will always supersede the first? Was there any case in which the first was recognised?

Might the first will, though *jure factum*, be set aside without making another?

Could a will, once frustrated, be restored to its original efficacy, under any circumstances?

Title 18.—Of Testamentum Inofficiosum.

The literal meaning of the term is "a duty," particularly a moral obligation, in which sense it has been treated of by Cicero in his celebrated essay *De Officiis;* and the strongest of these obligations are those by which we are bound to our own immediate families, although they were regarded by Cicero and other philosophers as secondary to those of a political nature. Any act, therefore, performed in violation of these natural obligations, was called *inofficiosum*, which may be translated "unnatural." A *testamentum inofficiosum* was one by which the ties of kindred were broken, and an inheritance left to strangers. In such cases the *Responsa Prudentum* interfered for the pro-

tection of children, and gave them the right of impugning such wills, under the pretext that the testator was insane; and in that case they could, as *hæredes legitimi*, recover the property from the *hæredes instituti*. It happened, however, under this as all other laws, that the various cases that might arise, differing from each other in details, though alike in principle, required to be met by corresponding provisions. The different relatives of the testator were regarded by the law as having different claims: children were considered the nearest, then ancestors, and, after them, brothers and sisters, whose claims were more fully recognised on the abolition by Justinian of all distinction between paternal and maternal relatives. This remedy, being one out of the ordinary course of the law, could not be claimed by those for whom the law in its usual course had provided; and, therefore, minors *adrogati*, to whom "the Antoninian fourth" was otherwise secured, and emancipated sons, who were entitled *contra tabulas* (the will notwithstanding) to a *possessio bonorum*, were excluded from its operation. But it was, at the same time, competent to some parties actually named in the will to prefer the plaint of *inofficiositas*, if they received less than a fourth of what they would have received in case of intestacy; and this fourth was, in that case, made up, according to an estimate of the property made by impartial arbitrators: it was called *quarta legitima;* and the claimant, *legitimarius;* but nothing given by the testator during his life—no *donatio inter vivos*—could be included in it.

This action *de inofficioso* was understood, like other actions for injuries, in the number of which it was included, to be extinguished, if the *legitimarius* allowed a certain time—two years at first, and five afterwards—to run against him, or if he acquiesced in the will directly or indirectly, as, for instance, by voluntarily claiming anything under the will from the *hæredes inst.*: but guardians were not debarred from an action on their own account, by demanding anything on behalf of their wards. It was also enacted, that a vexatious or unfounded claim disqualified the claimant, not only with regard to his demand, but also with regard to anything actually given to him by the will to which he objected.

All these regulations were revised and modified by Justinian. He specified fourteen causes, for any of which a testator should be justified in disinheriting his own family, provided the cause was stated and could be proved by the *hæres institutus*. Otherwise, he made the will invalid as to the *institutio hæredis*, allowing the other legacies to stand: he also increased the *legitima* to one-half, if there were more than four children, and, in all other cases, to a third.

QUESTIONS.

How do you define a *testamentum inofficiosum?*

Why was a pretext necessary to give effect to the suit?

What relatives, and in what degrees, were recognised as claimants?

Who were debarred from it, though apparently entitled, and why?

Were any persons, apparently debarred, entitled to become claimants, and when?

Who were *legitimarii*?

When did the plaint *de inofficioso* become extinguished?

What was the consequence of making this plaint on insufficient grounds?

What alterations in this law were made by Justinian?

Title 19.—Of the different Kinds of Hæredes.

Hæredes instituti were divided, according to the relations in which they stood to the testator, into three classes,—*necessarii, sui et necessarii,* and *extranei.* The first were slaves, who had no option of refusing the inheritance, if they belonged to the testator, and at the same time received their liberty. In these the inheritance vested immediately, rendering them liable to all the proprietary obligations which it involved; and this liability extended even to their own properties, until the Prætorian Law protected them by establishing "the separation of goods," which restricted all demands of creditors to the actual property of the testator.

The second class were the members of the testator's own family, who, like slaves, had no option of refusal, and were therefore *necessarii;* but, as they had been, during the testator's life, regarded as a sort of joint-proprietors with him, they were also called *hæredes sui* (heirs of their own property). The security against creditors enjoyed by these was

called the *beneficium abstinendi*, for no creditor could apply to them until they had in some way interfered with the property; and differed from the *separatio bonorum*, which did not secure to the *necessarius* any exemption so far as the value of the *hæreditas* went.

The third class (*extranei*) were those who had not been, at the time of the testator's death, subject to his *patria potestas*. These were not compelled, like the others, to accept the inheritance, and were therefore called *voluntarii*, and were obliged, either in word or deed, to accept in person. It was further necessary that they should not be incapacitated in any way from accepting an inheritance, either at the time when the will was made, or when it came into operation; and, therefore, if a *hæres extraneus* died before he had formally accepted a *hæreditas*, his heirs were excluded in favour of the *substitutus* or the *legitimi*. It may be inferred, from definitions already given, that a *hæres inst.*, if there was but one, could not receive a portion of an inheritance: he should accept all, with its liabilities, or none. If he once refused the inheritance, he could not afterwards accept it, except he had been in the first instance under the age of twenty-five, after which he might be *restitutus in integrum*; nor, after accepting, could he abandon it, except under the same circumstances; unless — as enacted by a Constitution of Gordian — he ascertained that it was insolvent. Under the old law, as the heir was not limited to any particular time for declaring his intention of ac-

cepting or refusing, it was customary for the testator, by what was called *cretio*, to fix a time within which a decision should be made, and for the prætors, on the application of legatees and other creditors, to name some limited period. These enactments were, as well as many of those on other subjects, all simplified by a comprehensive law of Justinian: he removed altogether the necessity of taking any time to deliberate, by establishing "the benefit of the inventory," which enabled the heir to ascertain at once the value of the inheritance; leaving him, however, the choice between that and a year for deliberation, which was the time allowed by the emperors, having been but nine months under the prætorian usage.

QUESTIONS.

How many classes were there of *hæredes instituti?*

What do you mean by *hæredes necessarii?*

What liabilities did their position involve, and how were they protected?

What heirs were *sui* and *necessarii?*

Explain this use of *sui.* Is it a possessive or a reflexive pronoun?

How did the *beneficium abstinendi* and the *separatio bonorum* differ?

Who were *hæredes extranei?*

Mention the several differences between their position and that of the other classes.

What principle of the law would it violate, if a *hæres institutus* succeeded to a portion of an inheritance?

Under what circumstances might an heir refuse after accepting, and accept after refusing, an inheritance?

What was cretio?

What was "the benefit of the inventory?"

Title 20.—Of Legacies.

Legacies were divided, according to the various forms of words in which they were made, into four denominations,—*per vindicationem, per damnationem, sinendi modo,* and *per præceptionem.*

The first were so called, because they gave the legatee the right of claiming his legacy by the action called *vindicatio,* being addressed to the legatee, or at least not addressed to the *hæres,* and laying no obligation upon the latter. The second were those by the terms of which (*hæres meus damnas esto*) the heir was "bound" to do certain things; and, not being addressed to the legatee, gave him only a personal action against the heir to compel him to fulfil the bequest. The legacy *sinendi modo,* as its name implies, merely commanded the heir "to permit" certain things to be done by the legatee, and, like the preceding, gave him only a personal action.

The fourth class were apparently the most emphatic of all, for they authorised the legatee to take beforehand (*præcipere*), *i. e.* before any partition of the property; but they gave no right of action, except the claim for partition. This was the interpretation of the Sabinians, who seem to have overlooked the objection, that, if legatees were entitled to help themselves before partition, the partition must have been rather a matter of indifference to them. But this *form of legacy* was most probably confined to *the hæredes inst.,* for the partition was made by

them exclusively. The theory of the Proculeians, borne out by a Constitution of Adrian, was, that any legacy of this form to others than the heirs should be regarded as identical with that *per vindicationem.*

The differences between these various forms of legacies, which were all virtually the same, were gradually abolished by the reforms of the Imperial Law. A *senatusconsultum* under Nero partially assimilated the two first denominations. A Constitution of Constantine superseded the necessity of verbal formalities, but still left untouched the general distinction between legacies *per vindicationem, i. e.* direct bequests, and those *per damnationem,* which laid obligations upon the heir. Justinian, at last, very sensibly, assimilated all legacies, irrespectively of all formalities, giving the legatee the right of *vindicatio* if the thing in question belonged to the testator, and a personal action if it was to be procured by the heir; and, in addition to these, gave to legatees in general, a right of *hypotheca* over the goods of the testator, and a right of action to enforce it. This reform he followed up by also assimilating legacies and trusts (*fideicommissa*).

No interests but those capable of being bought and sold (things *in commercio*) could be made the subjects of legacies: and these might be either present, and in the actual possession of the testator; or prospective, such as the produce of different kinds of property, and things in the possession of others which might be given *per damnationem,*—in which case the heir was bound either to procure them for the le-

gatee, or to pay him their estimated value. But the numerous variety of particular cases arising under these regulations were provided for by more special enactments, such as the following: if the testator disposed of another's property, under the impression that it was his own, the legacy was void, because it might be exceeding the testator's will to carry it into effect; but if the case was the reverse, and the thing really belonged to the testator, while he supposed it to be another's, the legacy was valid, because the obligation on the heir became so far lighter.

If the property left to a legatee was under incumbrance (*hypotheca*) known to the testator, the heir was obliged to clear it; if unknown, the legacy was void, as its fulfilment might exceed the testator's intention.

If the legacy related to a thing already in possession of the legatee, it was of course void, even though it may have, in the interval, ceased to belong to him, —because it was originally invalid, and should therefore continue so; but if the thing had not originally belonged to the legatee, and became his after the making of the will, he was entitled to the value which its acquisition may have cost him; and if he had received, not the thing itself, but its value, he could still demand the thing itself. If the bare possession of land was bequeathed, of which land the legatee had in the meantime acquired the usufruct, he could of course demand only the value of the land, *minus* the usufruct, to which the will had no reference.

In cases relating to debts, a creditor might bequeath to his debtor the debt due to him, that is an acquittance which the legatee might then enforce from the heir: but, in the reverse case, a debtor could not bequeath to a creditor the sum due to him, because he could, in any case, demand it of the heir; unless the bequest involved an earlier payment than the creditor could otherwise obtain: but if the time at which the will eventually came into operation was later than the period at which the claim could, under its ordinary conditions, be enforced, the legacy, having been originally valid, was valid still.

If a husband bequeathed to his wife her own dowry, the legacy was valid; because, although she was, under any circumstances, entitled to it, the legacy gave her additional facilities for its recovery. In bequeathing debts and dowries, however, it was necessary to specify the things, or to state the sums of which they consisted, in addition to defining them as debts and dowries.

A testator might also make his claim upon a third party the subject of a legacy; in which case the heir transferred his right of action to the legatee, and was then free of all further responsibility.

When legacies referred to what were called *genera*, that is, a specified number of anything of which the *genus* only was mentioned, such as so many horses, so many slaves, the legatee was entitled to make a selection, unless the contrary was expressly enjoined: and a legacy in this form differed from one in the more specific form of a choice (optio),

because, in the former case, the right could be transmitted to the heirs of the legatee, if he died in the interval; but the *optio*, being a mere personal right, could not survive him. Justinian afterwards made both these rights equally transmissible, and enacted that when they descended to coheirs, one should be selected by lot to choose for all.

With regard to persons eligible as legatees (that is, as the law expresses it, with whom the testator had the *testamenti factio*), there were also a great number of detailed enactments made. Those who were called *incerti*, whose personal identity was unknown to the testator, were excluded; with exceptions in favour of relatives whom he knew to be in existence and had never seen. But Justinian allowed the nomination of such persons as heirs, though not as guardians. As posthumous children and descendants came under the denomination of *incerti*, and as their claims were stronger than others of the class, a liberal exception was made in their favour, placing them on the same footing with other children.

As slaves had no civil existence except through their masters, their position as heirs and legatees required some peculiar provisions. A legacy to the slave of the heir was void; because the master would then be virtually the legatee, and, being also the heir, would owe an obligation to himself, which, however valid in ethics, was void in law. And the legacy, having been invalid in its origin, continued so, even though the slave may have, in the meantime, *ceased to be* that master's property: there was

an exception in favour of conditional legacies, because the will had no real existence, with respect to these, until the event of the condition was ascertained.

Errors in names, descriptions, and reasons assigned, were not considered to affect the validity of wills, provided the identity of the persons and things in question could be ascertained; but, if the reason assigned were a condition which did not exist, *e. g.*, if a certain sum be left to a particular person if he has done certain things (which he has really not done), then of course the legacy could not take effect. A reason assigned might also assume the form of a *modus*,—as when a legacy was left for the purpose of executing some specified work, such as building a house, or writing a book; and in that case the legatee was entitled to payment beforehand, on giving security for the execution of the bequest. A condition of this sort (a *modus*) differed from a condition properly so called; inasmuch as, in the former case, the will took effect immediately, and in the latter not until the condition was fulfilled, except the condition was negative (depending on the *not* doing a particular thing); and, in this latter case, the legacy was payable immediately, with a liability to be retracted in case the condition should be violated, because all such conditions generally continued uncertain during the life of the legatee. The security in these cases was called *Mutiana* (to be hereafter explained).

It was required by the old law, that the *institutio hæredis* should be the first clause in a will, and

accordingly any legacy preceding it was void; but Justinian, seeing the absurdity of making the mere arrangement of words a consideration of more importance than the intention of a testator, changed the law accordingly. He also rendered valid the legacies and trusts which were made to take effect after the death of heirs and legatees, which were not recognised by the old law on the principle that they related to *incerti*. Another provision, also, of the old law, which invalidated all penalties imposed by wills upon heirs for failing to do certain things, was abolished by Justinian, who authorised a testator to affix any penalty he pleased to the non-performance of his bequest, provided its performance was possible and lawful.

It was a recognised principle that a legatee should be entitled to nothing beyond what had been bequeathed to him; but, at the same time, all things incident or accessory to bequests, and attached to them at the time when the will took effect, such as the farming implements belonging to land, or the decorations of a house, or, in case of collective bequests, as flocks and herds, whatever numbers they might contain at the time, were all understood to be included.

The time when a legacy vested in the legatee, (*cum dies legati cedit*) was considered to be, in the case of an absolute legacy, the day of the testator's death, and in the case of a conditional legacy, the day when the condition was fulfilled; but legacies in general, although virtually belonging to the legatees

from those several days, were not actually payable until the inheritance was accepted by the heir. To these general rules there were of course some exceptions. When a legacy was of a personal nature, such as his liberty to a slave, it was not considered to vest until the acceptance of the inheritance. On this principle, if his *peculium* was bequeathed to a slave, every accession made to it up to the acceptance of the inheritance was his property, for he was entitled to receive it in the condition in which it might then be; but if that *peculium* were bequeathed to a third party, all additions made to it between the testator's death and the acceptance would go to the general account of the *hæreditas*, because in that case the testator's death would be the time of vesting. It may be observed that a bequest of liberty to a slave, though generally accompanied by, did not necessarily imply that of the *peculium* under his management; but when it was so intended, it was generally expressed indirectly, by excusing him from rendering an account of it.

It sometimes happened that the same thing was bequeathed to several persons, either separately or conjointly: in the former case the bequest could be carried into effect only by giving the thing in question to some one of the legatees, and its value to each of the others; and even this could not be done when the legacy was in the form *per vindicationem* or per *præceptionem*, which required the actual transfer of the thing itself. On this subject a comprehensive regulation was made by Justinian for all

cases in which the same thing was left to several legatees: *viz.*, that the legacy should be divided, if several came in together, and that on the refusal of his share by any one of them, that share should go among the others; with this difference, that when the bequest had been made separately, the portion of the refusing legatee went to the others without any of the obligations which it involved. This was on the principle of the original separation; but that, when the bequest was made conjointly, such vacant share could be accepted by the others only together with all its liabilities: besides, in the former case, it could not be refused, without refusing the legacy altogether; in the latter case, it could. The principle upon which a vacant share (*pars caduca*) was thus added to others, was called the *jus accrescendi*, which always existed as part of the Roman law, and, after passing through a variety of modifications in the interval, was eventually restored by Justinian to its original force. In order to understand the operation of this law, it will be necessary to remember that any set of co-legatees was regarded as an individual legatee with reference to the others, and therefore that portion of an inheritance left among them was divided among them, and confined to them exclusively, so long as any of them survived. Of co-legatees (*collegetarii*) there were three denominations, distinguished by the forms of words in which the legacies were conveyed: when the bequest was made *conjointly*, they were said to be collegetarii re *et verbis; when separately, re tantum*; and when

conjointly, but with a specified portion assigned to each, *verbis tantum.* In this latter case, there could be no *jus accrescendi* between co-legatees, because each portion was a distinct legacy, and a *pars caduca* then went to the *hæres inst.*; unless the division of the portions was so worded as to show that the testator only intended to define the proportions in which the thing was to be shared.

The disposal of *partes caducæ*, under the *leges Julia* and *Papia Poppæa* (passed in the reign of Augustus, when it was thought advisable to hold out every possible encouragement for increasing the population diminished by the Civil Wars), was altogether in favour of those legatees who were fathers of families, and were entitled to those legacies of which these laws deprived *cœlibes* and *orbi*; limiting the former to legacies from near relatives, and the latter to one-half of the properties bequeathed to them. But, as the necessity for this line of policy disappeared in the course of time, the privileges of parentage were abolished by Caracalla, Constantius restored *cœlibes* and *orbi* to their original rights, and Justinian revived the old impartial arrangements of the *jus accrescendi*

QUESTIONS.

How many denominations of legacies were originally recognised by the law?

Which of these imposed the heaviest obligations on the *hæres*?

What was the essential difference between bequests *per vindicationem* and those *per damnationem*?

What peculiar privilege did a bequest *per præceptionem imply*?

How did the differences between all these disappear?

What things only might be made the subjects of legacies?

If a testator bequeathed another man's property, under the impression that it was his own, what effect had his mistake upon the legacy?

What, if he disposed of his own property, believing it to be another's?

What, if a thing were bequeathed, of which the legatee had, in the meantime, become the possessor?

If creditors or debtors bequeathed the debts due to or by them, what was the consequence in each case?

What was the consequence of a man leaving to his wife her own dowry?

Could a testator dispose by will of his own claim upon a third party?

What was the difference between the bequest of *genera* and that of *optiones*?

Who were *incerti*, and what were their rights as legatees?

Can you name any exceptions?

What rights did slaves enjoy as legatees?

How did mistakes as to names, descriptions, &c., affect legacies?

If a conditional reason were erroneously stated, how did it affect the legacy?

How did a *modus* differ from a condition?

What was the necessary arrangement of the clauses of a will appointing heirs and defining legacies?

What was the state of the law at different times on the subject of penalty legacies?

Were there any legacies implying more than was actually specified?

In what cases was it necessary that deficiencies should be made good?

When was it understood that the provisions of wills came into actual operation?

Were there any exceptions?

What was the law respecting the *peculia* of slaves?

What was the *jus accrescendi?*
How were joint legacies classified?
How far did Justinian assimilate them, and what distinctions did he leave untouched?
Did the *jus accrescendi* apply to all joint legacies?
What was the object of the laws *Julia* and *Papia Poppæa?*
What were *partes caducæ?*
By whom were the laws *Julia* and *Papia Poppæa* repealed?

Title 21.—Of Legacies revoked and transferred.

Legacies might be revoked either directly or by implication. But it was only by the Justinian Law that the privilege of amending wills was given to testators in its full and rational extent; for, under the old laws, no revocation was recognised unless expressly and formally stated, and the interposition of the prætor was necessary to protect the heirs against the demands of legatees claiming under the original bequests. It was necessary, however, at all times, that the *institutio hæredis*, which was the most essential part of a will, should be revoked in due forms.

A revocation might be effected, either by disposing of the thing bequeathed during the testator's life, provided his intention in doing so were satisfactorily proved; or by a codicil; or by transferring the legacy to another legatee,—in which latter case the first disposition was annulled, even though the second was invalid, for it was then understood that the testator had abandoned his former intention, without carrying the second fully into effect.

Legacies might also be revoked conditionally; and then they virtually became conditional, involving terms the reverse of those upon which the revocation depended.

QUESTIONS.

How were legacies revoked?

Did the removal or disposal in another way of the thing bequeathed always amount to a revocation?

In what instance was it always necessary that the revocation should be formal?

What was the effect of transferring a legacy, supposing the transfer to be informal?

Title 22.—Of the Lex Falcidia.

The object of the Falcidian Law was to prevent intestacies, by restricting the power of the testator to encumber the *hæreditas* with legacies to such an extent that no heir would accept it Other laws had been previously enacted for the same purpose; but their provisions were so framed that they were easily evaded. The *lex Furia*, for instance, limited to a certain sum the bequest to nearly every legatee, which was evaded by increasing the number of legatees in proportion. Then the *lex Voconia* limited the other legacies severally to the amount left to the legatees; and when this was evaded in the same manner as the preceding, the *lex Falcidia* was applied, prohibiting the testator from disposing of

more than three-fourths of the *hæreditas* in legacies; so that the heir or heirs were secured in the possession of one-fourth of the whole, which was, therefore, generally known as "the Falcidian fourth." This provision extended to the case of each *hæres* separately, when there were several *instituti;* each was entitled to the fourth of the whole inheritance, the amount of legacies with which he may be charged notwithstanding. But when the several portions of the *hæreditas*, differently encumbered, were united by the *jus accrescendi*, if the encumbered part was regarded as an addition to the other, the fourth was deducted from each part; and when the unencumbered part was made an accession to the other, the fourth was once deducted from the whole. In order to ascertain the value of this whole, with a view to deducting the fourth, the condition of the *hæreditas* at the time of the testator's death was considered: all debts due to him were added; and all debts due by him, together with the estimated value of liberated slaves and funeral expenses, were deducted; then, taking his own fourth, at least, from the net amount, the *hæres* paid off the several legacies, according to the proportions which they severally bore to that sum. It was only indirectly, however, that the Falcidian Law operated; because, without expressly authorising the heir to curtail the legacies, it merely protected him against the actions of legatees, and enabled him to enforce the restitution of any bequest which a testator might have already in his possession: but, if the heir had, in the first instance, paid any

legacies to his own prejudice, he could not, as in the case of *fideicommissa*, demand restitution, until legacies and trusts were assimilated, when it may be inferred that, under the Constitution of Gordian, he was permitted to retract any errors, if not resulting from ignorance of the law. The Falcidian fourth continued to be, under all circumstances, a right of the heir, unalienable either by the directions of the testator or the previous renunciation of the heir; until a Novel of Justinian gave the testator full power to withhold it, and excluded the heir from its benefit, even in cases where the testator had not reserved it, unless he had taken an inventory. It appears, indeed, that, in general, under the law of Justinian, legacies were required to be paid in full.

QUESTIONS.

What was the object, and what were the provisions of the *lex Falcidia*?

What previous laws had failed in effecting that object?

How were they evaded?

How did this law operate in cases where separate inheritances were combined by the *jus accrescendi*?

How was the value of an inheritance ascertained?

What was the actual amount of protection given to heirs by the Falcidian Law?

Were they protected against the consequences of their own mistakes?

What was the law of Justinian on the subject of "the fourth?"

Title 23.—Of Trust Legacies and the Senatusconsultum Trebellianum.

The exclusiveness of the law relating to *testamenti factio* suggested a form of bequest, by which a testator was enabled to leave property to persons whom he could not name as legatees properly so called. The mode of proceeding in this case was to name an heir or legatee to whom the property was left, with a request that he would hand it over to the party for whom it was really intended; and, as this transfer could not be enforced under the provisions of the old law, it was left to the honour (*fideicommissum*) of the heir to fulfil it. Eventually, these *fideicommissa*, from their convenience, were recognised first by Augustus: a prætor, called *fideicommissarius*, was afterwards appointed to take them under his jurisdiction, and they became a part of the established law, with some restrictions as to the qualifications of legatees, which did not, however, confine them to the particular form of words required in the case of a regular legacy; but when the use of technical forms was abolished by Constantine, Justinian took the other step in advance, and assimilated them altogether.

The form of transfer being a fictitious sale, which left the heir still liable to the demands of creditors and others, naturally gave rise to so general a reluctance to undertake inheritances subject to these trusts, that it became necessary for the law to interfere further, and, accordingly, the *senatuscon-*

sultum Trebellianum (A. D. 62) decreed that the transfer of the trust should relieve the heir of all further liabilities, which were then to devolve upon the transferree, or, as he is called in technical language, the *cestuique trust*. But, even with this security, it was found that heirs were still deterred, by the generally unprofitable nature of the commission, from undertaking it; and the *senatusconsultum Pegasianum* (A. D. 73) was framed to authorise heirs to appropriate one-fourth, as under the *lex Falcidia* in the case of regular legacies, but made them liable to their original responsibilities; and, in case they refused to accept on these terms, to give the prætor power to compel them to accept and to transfer without any reservation, but with a freedom from further liability. It may be observed that these two *Sconsulta* did not interfere with each other, but merely applied to different cases. The object of the *Trebellianum* was to relieve the heir of responsibilities—when the amount to be transferred did not exceed three-fourths of the inheritance, when the heir was compelled by the prætor to accept, and when the heir voluntarily and gratuitously transferred all. The object of the *Pegasianum* was to secure to the *hæres* compensation for his trouble and responsibility, and to divide that responsibility between him and the person principally benefited, by means of mutual guarantees. But the intricacy of all these regulations induced Justinian to simplify the law by a comprehensive enactment, the provisions of which were that the heir, by a voluntary acceptance,

should be entitled to his fourth, without any heavier responsibility than that portion of the inheritance involved; that other liabilities should fall upon the transferree, and that in case the heir refused to accept, he should be compelled to transfer the whole, and be freed from all liabilities. This enactment, which still retained the name of the *Sconsultum Trebellianum*, was really a combination of that and the *Pegasianum*, and was applicable alike to those cases in which heirs were appointed to portions and to whole inheritances: in either case the heir was entitled to a fourth of the portion entrusted to him. This law further provided for another case which might sometimes arise. It happened occasionally that a testator would reserve certain specified things to the heir, instead of leaving him the fourth: in such cases the transfer was made as before, the heir and the transferree sharing the liabilities between them, when the fourth was reserved, for they were then co-heirs; while, in the case of a specified bequest to the heir, he became a legatee, and transferred the *hæreditas* with all its incumbrances to the transferree, who might of course refuse to accept it, if it appeared unprofitable.

When the heir and the transferree changed places, as they may be said to have done under the Trebellian decree, the heir might demand of the transferree any complement of which his share fell short of the fourth; and this privilege, which at first belonged only to *instituti*, was afterwards transferred to *legitimi*.

It must be almost superfluous to mention, that a

fedeicommissum might be entrusted to one *cestuique trust*, or transferree, for the benefit of another, and in this way might be made to pass through the hands of several; but, the first transferree in such cases, was not entitled, like the heir, to the reserved fourth: the reason of this distinction was, that the reservation of the fourth was a privilege granted, in order to insure the existence of an heir; and that the transferree, in consequence of the latitude granted to testators in the choice of transferrees, might be a person who could not, according to law, be a *hæres institutus*. If, however, the transferree assumed the position of the heir so far as to pay legacies, then, as the heir's representative, he could reserve the Pegasian fourth.

QUESTIONS.

What was the origin of *fideicommissa*?

By whom was the use of technical forms in testamentary dispositions set aside?

What circumstances suggested the provisions of the Trebellian decree?

What were the provisions of the *Sconsultum Pegasianum*?

To what cases were they severally applicable?

How were they combined by Justinian?

What was the essential difference between the real *hæres*, and the transferree, or *fideicommissarius*, acting as *hæres*?

Title 24.—Of Specific Things bequeathed in Trust.

Although legacies and *fideicommissa* may be reasonably regarded as virtually identical, there were some wide differences between them in addition to those already noticed. The principal distinction originally recognised was made by the forms of words in which they were respectively set down; legacies being always expressed in the imperative mood (as, for instance, *damnas esto, sumito, capito*), and trusts in the indicative (as, *rogo, peto, mando, fidei tuæ committo*, &c.), whenever they were stated in writing; for they might be verbally made. Another distinction, which may be inferred from the preceding title, was the fact that legacies could be administered only by an heir, while a trust might be committed to any legatee,—who would be bound by such trust, if accepted by him, to transfer or procure for the person for whom it was intended any specified thing belonging to the testator, to himself, or to any third party; to purchase and manumit any slave, whose emancipation was committed to him; and even to wait until he could purchase that slave at a reasonable price, because no slave could be directly emancipated by legacy, unless he was the testator's own property, both at the time when the will was made, and at his death.

It was the law of Justinian that trusts may be created *vivâ voce* in presence of five witnesses; but *even in case of* a deficiency of witnesses, the exist-

ence of the trust might be tested by an oath which the *cestuique trust* was allowed to administer to the heir or legatee whom he supposed to be charged with it, pledging his own oath, in the first instance, that he was not acting upon vexatious or frivolous grounds. This ceremony is defined by the phrase *de calumniâ jurare.*

QUESTIONS.

To whom might the execution of a testamentary trust be confided?

What properties might be made the subject of a trust?

When was it necessary to resort to this form of bequest, in order to emancipate a slave?

How did legacies and trusts differ as to phraseology?

What forms were required in the case of a trust created *vivâ voce?*

What do you mean by the phrase *de calumniâ jurare?*

Title 25.—Of Codicils.

The meaning of the term "codicil," in Civil Law, is considerably different from that which we now generally attach to it; and an ignorance of this fact, and of the original signification, has occasioned several errors respecting the meaning of passages in the ancient classics. A codicil was really a less solemn and less formal species of will, and might exist with *or without* a regular *testamentum*; i. e. it might *be made by one* either testate or otherwise intestate,

and, therefore, might be made either before or after a will. If made before the will, however, it was void unless confirmed by it, and any informality sufficient to annul the will was also fatal to the codicils. The essential differences between codicils and wills were, that codicils could dispose only of trusts and legacies, while a *hæreditas* could be established only by a will, and that several codicils might coexist independently of each other, relating to different matters; while no testator (except a soldier) could execute more than one will, for a will necessarily disposed of the whole inheritance. Originally, no particular form of words was required in drawing up a codicil; but under the Eastern emperors some technicalities were introduced, together with the necessity of bringing together five witnesses, of performing the whole ceremony continuously, and adding signatures, if it was committed to writing.

Codicils were introduced first in the time of Augustus, and the emperor himself was the first legatee who ever executed a trust so conveyed. It is said that one of the Lentuli dying in Africa, where circumstances prevented his complying with the regular formalities of a will, committed to the emperor a *fideicommissum*, among many others created in the same irregular way, and that his execution of the trust, which was recognised as a precedent by others, and the opinions of Trebatius and other eminent jurists, resulted in its establishment as a portion of the law. On this subject it may not be uninteresting to remark that wills, after having been, for

several centuries, confined to the Latin, were eventually, as a matter of convenience (in A. D. 439), permitted by law to appear in Greek.

QUESTIONS.

What is the meaning, in Civil Law, of the term *codicil*?

Was the existence or validity of a will in any case indispensable to that of a codicil?

What were the differences between them?

Which was the more convenient form of bequest?

Were technical forms ever required in making codicils?

In what language should a will be written?

BOOK III.

Title 1.—Of Inheritances in Cases of Intestacy.

When a man died intestate, *i. e.* when he made no will whatever, or one which was originally or became subsequently informal (*non jure factum, ruptum, irritum*, or *inofficiosum*), or when the *hæres institutus* refused to act, the law interfered to call his relatives, in their proper order, to the succession, and the heirs who succeeded in that case were called *legitimi*, as being appointed by the law. Under the Law of the XII. Tables, the nearest successors were the *sui hæredes*, and, failing these, the *agnati* in general; and this arrangement, with some modifications introduced by the Prætorian Law and *SCta*, continued in force until the time of the *Novellæ*. The members of the family who were *sui hæredes* have been already defined (B. II. T. 19.); but, there were some cases, in which that definition must be extended to include apparent exceptions. It sometimes happened that a son was in captivity at the time of his father's death, and was not of course then

a *suus hæres;* and returning afterwards, resumed his original position in the family, the fact of his captivity being ignored by the *jus postliminii:* and, on the other hand, it was sometimes possible that children who had been under the *patria potestas* to the last could not be *sui hæredes;* this happened when the father was, after his death, pronounced guilty of high treason (*perduellio*), and was consequently excluded from all civil rights during the period counted back to the commission of the offence, — so that his children were regarded as having been from that time altogether *sui juris*, and his property confiscated. These *sui hæredes*, however, did not all succeed to the inheritance upon equal terms; the *hæreditas* was divided between them partly *per capita* and partly *per stirpes*. To those of the first degree it was distributed *per capita, i. e.* an equal share to each; to more remote descendants, *per stirpes*, — each family of grandchildren, for instance, succeeding to the single share that should have come to the father whom they represented. The number of those who were capable of succeeding in participation with *sui hæredes* was considerably extended by the Prætorian Law, and their several rights were defined by a proportionate number of enactments. Children who had been emancipated, children adopted into other families and emancipated therefrom, grandchildren born of emancipated children within certain limits of time, and children who had been restored to their original position, after suffering *diminutio capitis*, were all included, under various conditions,

by the Prætorian Law, not as *sui hæredes*,—for that name was confined to those who were entitled to it under the old law, — but under the denomination of *unde liberi* (i. e. *ex edicto unde liberi vocantur*). When these members returned as inheritors to the family from which they were regarded as having been separated for a time, they were obliged to contribute to the general stock of the inheritance all that they had acquired in the interval; because, had they remained in the family, these acquisitions would have been made for the benefit of the common stock, with the usual exception of their *peculia castrensia* and *quasi-castrensia*; and this contribution was called the *collatio bonorum*. Under this arrangement, the singular case sometimes occurred of a father and his children coming in together as distinct sharers in the inheritance; for if the father had been an emancipated son, his children had become during his absence *sui hæredes* of their grandfather, and continued so; and the father, on his return to the family, was also entitled to a share, but was obliged to make a *collatio bonorum* with them; for they were the only party who suffered by his admission.

In the case of children adopted into and emancipated from other families, it was required that such emancipation should have taken place before the death of their real father, to entitle them to a share in the inheritance; because, it was necessary to guard against the possession of a power on the part of the adopted father, to admit them to the inheritance, or to exclude them from it at his pleasure. But, under this

restriction, it might happen that an adopted son would be excluded, by an emancipation following his father's death, from the inheritances of both his real and his adopted father; for emancipation by an adopted father, unlike that by the real father, separated one altogether and irrevocably from the family. In order, therefore, to obviate this possible hardship, Justinian ordered that an adopted son should never be altogether alienated from his father's family and identified with that of his adopter, unless the adopter were an ancestor; but that, in all cases where the adopted should have no claim upon the inheritance of his family, — as, for instance, a grandson, whose father was still under the *patria potestas*, — he should pass altogether into the adopting family, and thereby gain an inheritance; and that, even in the former case, when he did not altogether leave his own family, he should be entitled to share the property of his adopter dying intestate. To the number of these claimants, still further additions were made by the Constitutions of Theodosius, Valentinian, and Arcadius, who included the children and grandchildren of the daughters of the deceased, subject to a *collatio* of a fourth to the *agnati* whom they excluded. But Justinian, acting on the principle that direct descendants, whether of the male or female line, should supersede collaterals, allowed them to come in without any restriction, although he had, at first, limited a daughter's children to two-thirds of the share to which their mother would have been entitled.

QUESTIONS.

Who were *hæredes legitimi?*

In what cases was one said to die intestate?

Can you mention any case in which a person, not at first *suus hæres*, became so after the death of the intestate?

Was it possible that any who were *sui hæredes* at the time of death, might lose that character afterwards?

What do you mean by the division of a *hæreditas*, *per capita*, and *per stirpes?*

Whom did the Prætorian Law include among *sui hæredes?*

Under what name were they admitted?

What was the *collatio bonorum?*

Could it ever happen that a father and his children succeeded together to the grandfather's inheritance?

How did Justinian regulate the anomalies of the law relating to the claims of adopted sons?

What additional members of families were included by the Constitutions?

Title 2.—Of the Succession (Lege) of Agnati.

In cases of intestacy and the failure of *sui hæredes*, the kindred of the second degree succeeded to the inheritance, both under the Law of the XII. Tables and that of the Constitutions. These were the *agnati;* and, as a peculiar and more limited signification is attached to the term with reference to this *hæreditas legitima*, it may be necessary to explain that it includes here only those collaterally descended rela-

tives of the deceased who would have been, together with him, under the *patria potestas* of a common ancestor, if that ancestor were alive. The object of this arrangement was to keep the property of the deceased in his family; and for this purpose *agnati* were divided into two classes, of which one, called *consanguinei*, and including only the brothers and sisters of the deceased, took precedence of the other. From this second class women were of course excluded, because female descendants of the second degree were supposed to belong to other families; and it sometimes happened that they were succeeded by relatives to whom they could not themselves succeed. But Justinian, as it has been already stated, abolished all distinctions, and placed all the *agnati* in the natural order of succession. The number of the *agnati*, like that of the *sui hæredes*, was considerably enlarged by subsequent additions. Emancipated brothers and sisters were included by Anastatius, subject to a *collatio* of a fourth; and, by several successive enactments of Justinian, the children of such emancipated persons, brothers and sisters *uterini* (*i. e.* having the same mother only) and their children, and, in fact, all *cognati* of the second degree, and some even of the third degree, were allowed to be considered as *agnati*. There was, however, one remarkable difference between the system of succession among *hæredes sui* and *agnati*; for the latter succeeded each other personally and *individually*, without any division *per capita et stirpes*, — the inheritance devolving always upon that

person who happened to be the nearest, when it was ascertained that there would be no *hæres testamentarius*.

Emancipated persons were of course regarded as having no *agnati*, and their inheritances were accordingly disposed of by the law on the same principle as those of freedmen; as the patron in one case, so the emancipating ancestor or purchaser in the other, was the person upon whom the succession devolved, until Justinian, upon a more rational and equitable principle, enacted that the ties of blood should supersede those of the law.

Under the old law no *hæreditas ab intestato* descended from persons under the *patria potestas*, though they had the right of disposing by will of their *peculia castrensia* and *quasi-castrensia*, and, more recently, of all property derived from maternal ancestors: all their acquisitions went back in case of intestacy to the *paterfamilias*, not by any right of succession, but by the right of paternal authority (*jure communi*); but, by the Constitutions of some of the Eastern Emperors, and finally by an enactment of Justinian, these properties were allowed to descend *ab intestato*, in the first instance to the children of the deceased, then to his brothers and sisters, and, failing these, to the *paterfamilias*.

QUESTIONS.

When were *agnati* called to a succession *ab intestato?*

To whom does the name *agnati* apply in this case?

What selection was made in order to keep properties in the *same families?*

How did Justinian modify the law?

What relatives were afterwards included in the number of the *agnati?*

At what particular time should an *agnatus* be the nearest in order to succeed?

Upon whom, at different times, did the inheritance of an emancipated person devolve *ab intestato?*

What was the old law relating to the inheritance of a *filius-familias?*

How did Justinian dispose of these inheritances?

Title 3.—Of the Senatusconsultum Tertullianum.

The object of this S. C., passed in the reign of *Antoninus Pius* (A. D. 158), was to relax the strictness of the old law, which prevented mothers and children from succeeding each other; because they were connected by *agnatio* with different families, she with that of her father, and they with that of her husband, — except only when she was regarded as being *in manu* of her husband, in which case she became an *agnata* (as if she were the sister) of her own children. The Prætorian Law had previously interposed, to enable mothers and children to succeed each other, by granting a *possessio bonorum unde cognati:* but this of course could only be done in the absence of *hæredes sui* and *agnati;* and Claudius had in the meantime granted to a mother an *hæreditas legitima,* as a sort of compensation for the loss of her children. In order, therefore, fully to carry out these suggestions, the S. C. provided

that the mother of three children, if an *ingenua*, and of four children, if a *liberta*, should be reckoned among the *agnati*, and succeed to the inheritance in default of *sui hæredes*; except in cases where the father was alive to exclude her, where the children had died during their minority, and she had neglected to provide them with guardians. The mother enjoyed no precedence of other *agnati*; for, even in cases where children had become *sui juris* without *dim. capitis*, and there were of course no male ancestors in the paternal line, she succeeded only after brothers, and jointly with the sisters, of the deceased: nor did the S. C. give her any advantage over children of the deceased who had been adopted into other families (for this would be equivalent to including a grandmother among *agnati*), nor, for the same reason, any priority of claim upon the inheritance of a grandchild whose father had been emancipated, and who was, therefore, immediately under the *patria potestas* of the grandfather. The provisions of the S. C. were considerably modified by certain Constitutions, under which a third was assigned to mothers who had not so many as three children, and a third taken from those who had, in favour of some agnati, *viz.* uncles, and cousins of the first and second degree; but all these intricate *minutiæ* and distinctions were, as usual, abolished by Justinian, who gave the mother precedence of all but the very nearest *agnati*, and assigned her an equal share with these in a division *per capita*.

QUESTIONS.

Why could not mothers and children succeed each other under the old law?
What was the object of the *S. C. Tertullianum*?
When was it passed?
How far had the Edicta anticipated it?
In what cases did this S.C. give precedence to mothers?
How did Justinian arrange the law?
What other modifications had been made in the meantime?

Title 4.—Of the S. C. Orphitianum.

The object of this S.C. was to admit to the inheritance of maternal property children who were excluded by the old law, as the *S. C. Trebellianum* admitted mothers to the inheritance of children; so that the two *SCta* were framed in recognition of the principle of giving the ties of blood a preference over those of mere legal relationship. The joint succession of the mother and children of a deceased woman, which resulted from these enactments was abolished by the Constitutions of Gratian, Valentinian, and Theodosius, in favour of the exclusive succession of children, and, eventually, of children and grandchildren; and, in these cases, as consanguinity alone was considered, it was a matter of course that *dim. cap. minima* (*i. e.* emancipation and adoption) was no *bar to succession*. It must also be evident, that, as *the design of* these several modifications of the law

was to keep properties permanently in the same families, the *jus accrescendi* would naturally operate in dividing any *partes deciduæ* that might fall in, among the survivors.

QUESTIONS.

What was the effect of the joint operation of the *SCta Trebellianum* and *Orphitianum?*

How was the operation of the latter S. C. extended by Constitutions?

Why was *dim. cap. minima* no bar to succession under these acts?

What became of *partes deciduæ?*

Title 5.—Of the Succession of Cognati.

Cognati, being those who were connected by blood alone, were the relatives in whose favour the Prætorian Law interfered to mitigate the restriction of the old law, which recognised only civil relationship and limited the succession to the *agnati* properly so called. Accordingly, those *agnati* who had lost their civil relationship by *dim. capitis* came in as *cognati;* adopted children succeeded their real fathers as *cognati*, and their adopted fathers as *agnati*, and, by a legal fiction, as *cognati*. The advantages of such fictitious *cognatio* was this: until Justinian's time there was no devolution of succession from one *agnatus* to another; if the nearest *agnatus failed* or refused to succeed, all other agnati

were excluded as such, and could then come in only as *cognati;* but the succession was not allowed to descend through *cognati* farther than the sixth, and, in some cases, the seventh degree, while *sui hæredes* and *agnati*, even to the tenth degree, were admitted to the *hæreditas legitima.*

QUESTIONS.

In what cases did succession devolve upon *cognati?*

In what character did adopted succeed in both families?

What interest had *agnati* in being allowed to appear as *cognati?*

Through how many degrees of *cognatio* did succession devolve?

Title 6.—Of the Degrees of Relationship.

To understand the several degrees of relationship alluded to in the technical language of the law, it will be necessary to explain that they are classified into two lines, the direct and the collateral, in both cases ascending and descending. In the direct line six degrees in each direction (ascending and descending) are generally counted under special names, all beyond that limit being indicated by stating the number of generations: for instance, in the first degree, above, are father and mother; below, son and daughter.

In the second degree, above, are grandfather and

grandmother (*avus* and *avia*); below, grandson and granddaughter (*nepos* and *neptis*).

In the third degree, above, are great grandfather, &c. (*proavus* and *proavia*); below, great grandson, &c. (*pronepos* and *proneptis*).

In the fourth degree, above, are great great grandfather, &c. (*abavus* and *abavia*); below, great great grandson, &c. (*abnepos* and *abneptis*).

In the fifth degree, above, are the great grandfather's grandfather, &c. (*atavus* and *atavia*); and below, the grandson or granddaughter of the great grandson, &c. (*atnepos* and *atneptis*).

In the sixth degree, the direct relatives, above, are *tritavus* and *tritavia;* and below, *trinepos* and *trineptis.*

Then, in the collateral line, the second degree included only brothers and sisters.

The third degree, above, uncles paternal and maternal (*patruus* and *avunculus*), and aunts paternal and maternal (*amita* and *matertera*); and below, nephews and nieces (*fratris sororisve filius et filia*).

The fourth degree contained, above, the great uncles and aunts on both sides (*patruus* and *avunculus magnus, amita* and *matertera magna*), brothers' and sisters' grandsons and granddaughters, and cousins (*consobrini, patrueles,* and *amitini, i. e.* the children of two sisters, of two brothers, and of a brother and sister respectively). — [In the Latin classics we sometimes find *first* cousins called *fratres* and *sorores.*]

In the fifth degree we meet brothers' and sisters'

great grandsons and great granddaughters, the brothers and sisters of great grandfathers and great grandmothers (*propatruus*, *proamita*, *proavunculus*, and *promatertera*); and, descending, the first cousins' sons and daughters, and the first cousins of father and mother (*sobrinis propriores*, *i. e.* one degree nearer than the relationship between the children of two first cousins, who were called *sobrini*).

Although no relationship between slaves was recognised by the old law, Justinian granted the right of succession to children and to brothers and sisters of that class.

It will, of course, be apparent, that, as it was only in default of a *suus hæres* or *agnatus* that the nearness of relationship entitled one to a succession, a nearer relative would be sometimes superseded by a more distant, as, for instance, grandchildren, when *sui hæredes*, would take precedence of the brothers and sisters, and father and mother, of the deceased.

QUESTIONS.

What relationships are indicated by the following terms: *abavus*, *atavus*, *tritavus*, *proneptis*, *trineptis*, *matertera*, *promatertera*, *patruus*, *avunculus*, *proprior sobrino*, *amitini*, *consobrini*, and *patrueles*?

How were the ties of kindred between slaves regarded by the law?

Was the nearest relative in all cases the nearest to the succession?

Title 7.—Of the Successors of Freedmen.

Freedmen, having had in their previous isolated position no recognised kindred, occupied a rather anomalous position with respect to succession. The patron, as *paterfamilias*, and the patron's children, as *agnati*, succeeded in default of *sui hæredes;* and, in order to prevent his patron from succeeding to his whole inheritance, it was necessary for the freedman to appoint a *hæres* (*institutus*), and even by so doing he could not exclude him from the half of the property to which the Prætorian Law entitled him *contra tabulas*, unless the *institutus* were the testator's own son; and if he died intestate, no heir but his own children could exclude the patron from his half. These rights were given to patrons, whose children also inherited them, and to patronesses, by the XII. Tables; but the Prætorian Law did not give to patronesses' or patrons' female children the *possessio bonorum contra tabulas.*

These privileges were extended by the *lex Papia Poppæa*, which admitted such patronesses as were mothers of a certain number of children, and entitled patrons and patronesses (as before) to an equal division of the property with the freedman's own children, when the number of these was less than three, and the property amounted to 100,000 HS.

Justinian modified all these rights into the following system: — First making a distinction between *freedmen who* left more, and those who left less than

100 *aurei* (*majores* and *minores centenariis*), he admitted patrons and patronesses, in the former case to a third, in the latter to the amount bequeathed to them, whatever it might be. He also admitted to the same rights, in the regular order of relationship, the children and other relatives, representing patrons and patronesses, to the fifth degree, and in preference to all relatives of the deceased, except children.

These regulations, however, under the old law, did not apply to such freedmen as only held the rank of *Latini Juniani*, because at their death the fact of their liberty was ignored, and all their acquisitions went to the patrons or their representatives: but all distinctions of freedmen were abolished by Justinian.

QUESTIONS.

What claims did the Prætorian Law give to patrons upon the properties of deceased freedmen?

What rights were added to these by the *lex Papia Poppæa*?

What was meant by the phrase *major centenariis*?

How was the law regulated by Justinian?

What was the law respecting the succession of freedmen who were *Latini Juniani*?

Title 8.—Of the Assignatio of Freedmen.

It was in the power of a patron, by any form of *written or spoken* words, to set aside the equal par-

tition among his children of a freedman's succession, by assigning such freedman to any one of his children or grandchildren; in which case such child or grandchild succeeded alone to the inheritance, excluding all the rest and transmitting the right to representatives. An assignment of this sort, however, could benefit none but a *filiusfamilias*, and, as it was annulled by the emancipation of the assignee, the precaution was sometimes taken of making a joint assignment to two *filii*, so that, in case it was annulled with respect to one, it would continue valid for the other. This power was granted by a *senatusconsultum* (A. D. 45).

QUESTIONS.

What was the effect of the assignment of a freedman by a patron to a *filiusfamilias*?

What formalities did such assignment require?

How might the assignment be annulled?

By what law was this privilege created?

Title 9.—Of the Possessio Bonorum.

The *possessio bonorum* was one of those institutions of the Prætorian Law by which the provisions of the XII. Tables and other ancient enactments were so amended as to meet the requirements of a larger community and a more fully developed constitution. Its object was to admit to inheritances those relatives whom the old law excluded, and to substitute

a natural for a civil relationship. This was effected by the prætor granting the *possessio unde liberi* to children who had been emancipated or adopted, and had thereby lost the position of *sui hæredes*, and to *postumi alieni, i. e.* to those who, if born during the testator's life, would not have been under this *patria potestas*. Even in cases where the concession of this right was apparently confirmed, it really amended the old law; because, when granted to those who were already admitted by that law, it ensured to them certain advantages which they could not otherwise have enjoyed, such as the *interdictum "quorum bonorum,"* which was an injunction to compel the actual holders of inheritances to surrender possession to some more legitimate successor. In this case the additional sanction of the Prætorian Law was called *possessio secundum tabulas*. Its general and more peculiar operation, however, was the creation of an additional class of successors, the *cognati*, which had been altogether overlooked by the narrow provisions of the XII. Tables; but the successors thus called into existence were not actually recognised as *hæredes* by name, being called merely *bonorum possessores*, though they were virtually *hæredes*, and enjoyed all the rights and incurred all the obligations involved in that title. The *possessio bonorum* was classified according to the various circumstances under which it took effect.

In cases where wills were made, there was the *possessio contra tabulas*, granted to those heirs who had been omitted from the testaments of their pater-

familias, and that *secundum tabulas*, giving additional securities to such as may have been included.

In cases of intestacy, it was granted under eight several denominations: — 1. That *unde liberi*, by which the *sui hæredes* and those included in their number were called; 2. that *unde legitimi*, by which the *agnati*, with all the additions to their number, were called; 3. that *unde decem personæ*, by which ten *cognati*, related in the first and second degrees, were called, in preference to the *manumissor extraneus* (*i. e.* the person who, not being a member of the family, had acquired the deceased by *mancipatio*, and then, emancipating him, became, by a fiction of the law, his patron); 4. that *unde cognati*, by which the nearest blood-relations were called; 5. the *possessio tum quem exfamiliâ*, by which the patron's nearest relations were called; 6. that *unde patronus patronave*, by which the patron or patroness of the patron (who would in this case be a freedman), and their representatives, were called; 7. the *possessio unde vir et uxor*, by which a surviving husband or wife was called; and 8. that *unde cognati manumissoris*, by which the *cognati* of the patron were called.

Of these several *possessiones*, Justinian abolished all that related to the rights of patrons; because, after the assimilation of the condition of freedmen to that of *ingenui*, and the removal by *contracta fiducia* of the fictitious patronage attached to *mancipatio*, such provisions became superfluous: the other six he retained, together with a seventh (that called uti lex *legibus*), to which, in extraordinary cases, the prætor

called all those who had already a right arising under any established law, *senatusconsultum*, or Constitution.

In cases of *possessio bonorum*, the devolution of the succession was from one rank to another, and, within the same rank, from one degree to another; and the time limited by the Prætorian Law within which a claim should be made, was one year for relatives in the direct line, and 100 clear days for those in the collateral; and if the claim were not advanced within the specified time, it was forfeited in favour of the successors next in order. Except under the old law, no formality was necessary.

It sometimes happened, however, that the persons already called to the inheritance by the old law dispensed with the ceremony of demanding *possessio* under the Prætorian; in which case the *possessio* devolved on those next in order,—and then, as the property was preoccupied, it was called *possessio bonorum sine re*.

QUESTIONS.

What is meant by the phrase *possessio bonorum?*

Explain the phrases *contra tabulas* and *secundum tabulas*.

What advantage resulted from *possessio bonorum* to parties already in possession, according to the old law?

What was the object of the Prætorian Law in calling *cognati* to the succession?

Did they succeed as *hæredes?*

How were *possessiones bonorum* classified?

What was the possessio unde decem personæ?

How do you fill up this elliptical phrase?

Which of these were abolished by Justinian, and why?
What was the devolution of the *possessio bonorum*?
Within what time should it be claimed?
What was *possessio bonorum sine re*?

Appendix.—Of Succession ab intestato, under Novellæ 118. et 127.

The object of Novella 118., which appeared in A. D. 543, three years after the promulgation of the Institutes, was to abolish the limitations of the XII. Tables which had remained in force until then; and also to abolish the distinctions between *hæreditas* and *possessio bonorum* (virtually identical), and between *agnati* and *cognati*, so as to leave but three comprehensive classes of successors—descendants, ancestors, and collaterals. Among these the order of precedence was arranged as follows:—

1. All descendants, real or adopted, without distinction of sex, succeeded *per capita* in the first, and *per stirpes* in the more remote degrees. 2. Failing descendants, ancestors succeeded jointly (*per capita*) with brothers and sisters, and, failing these, *per stirpes*. 3. Failing descendants and ancestors, brothers and sisters *germani* succeeded; and failing these, brothers and sisters, *consanguinei* or *uterini*, in person or represented by their children; and failing all these, the nearest relatives;—the only exclusion being against heretics, and the only distinction *of sex being* in the case of tutela legitima, which

(according to the *S.C. Velleianum*) could not devolve upon women, except mothers and grandmothers remaining unmarried.

QUESTIONS.

How long did the enactments of the XII. Tables respecting successions remain in force?

What distinctions were abolished by *Novella* 118.?

What were the new rules of succession?

What disqualifications were recognised?

How did these rules affect *tutela legitima*?

Title 10.—Of the Acquisition of Property by Adrogatio.

It was rather a recognised usage than a law, that the proprietorship involved in the *patria potestas* passed together with the *adrogatus* to the *adrogator*; and this right included all the collective property of all kinds (the *universitas*) of the *adrogatus*, except only those faculties and obligations which were due to the patron personally, such as *agnatio* and the *obligationes operarum* (professional services), and were extinguished by the *dim. capitis minima*. The limit, also, which restricted to a mere usufruct the power of the natural father over the property of a *filius-familias*, applied similarly to the power of the *adrogator*, so that he acquired eventually no property of the *adrogatus*, unless such *adr.* died in the adopted family, and was unrepresented by descendants, or brothers *and sisters*; and the creditors of the adrogatus could

indirectly enforce their claims against him, by seizing and selling the property of the *adrogatus*.

QUESTIONS.

What was the origin of the custom of acquiring property by *adrogatio*?

What species of property was thus acquired?

Were there any exceptions?

What liabilities were involved in the acquisition?

Title 11.—Of the Adjudicatio Bonorum for sustaining Enfranchisements.

When heirs, either *instituti* or *legitimi*, refused a succession on the ground of the insolvency of the estate, enfranchisements involved in the inheritance were frustrated, and, in the absence of heirs, the creditors of the deceased were entitled to sell the property, as *bona vacantia*; but, by a Rescript of M. Aurelius, in order to promote enfranchisements, and to protect the memory of the deceased from the obloquy of having his property sold in his own name, the property might be assigned to one of the slaves in question, or, in fact, to any person willing to accept it, on condition that he effected the liberation of the slaves, and undertook to be accountable to creditors. In such a case, the property could not be sold as *vacantia*, because the person to whom it was assigned (the defensor idoneus) was *the representative* of the deceased: the slaves were

set free, and the deceased, or the *defensor*, became their patron. It is evident that such *adjudicatio* could not take place unless there were slaves to be enfranchised, and that—as liberty once granted could not be revoked — the *restitutio in integrum* (after his twenty-fifth year) of a successor who had previously declined the inheritance could not affect the condition of the slaves, who had, in the interval, become freedmen. In addition to the case specified, the Rescript applied also to enfranchisements made by codicil, *mortis causâ*, and even *inter vivos;* because the *defensor* was accountable to the creditors, and no objection could arise on the ground of prejudice to them.

QUESTIONS.

Was there any mode of acquiring property *per universitatem*, in addition to those explained above?

What was the object of the Rescript of M. Aurelius?

And what facilities did it create for effecting that object?

What do you mean by a *defensor idoneus?*

In what cases only could this *adjudicatio* take place?

What effect had the subsequent appearance of a successor?

Did this arrangement apply to testamentary enfranchisements alone?

Title 12.—Of Bonorum Emptio.

In addition to the preceding modes of acquisition, *there was still* another, which also arose in cases of *insolvency, when* a debtor either avoided being sued

by concealing himself, or allowed judgment to go by default, or was condemned, or when, after his death, he was not represented by a successor, the creditors obtained from the prætor a right of execution, under which (*missio*) they took possession of the property; and, after an interval of thirty days, if the debtor was alive, or fifteen days, if dead, during which it was advertised for sale, one of the creditors who was appointed assignee (*magister*) disposed of the whole estate (*universitas*) to the purchaser, who undertook to pay the creditors the largest per-centage on their several claims, and, by this *bonorum emptio*, became in fact the representative of the debtor, as the *magister* was of the creditors. This arrangement was introduced by the Prætorian Law, in order to free debtors from the personal restraints imposed by the penal enactments of the old law. But, in the latter periods of the law, the form of this *emptio* was changed: the purchaser no longer succeeded *per universitatem;* and the property was sold in detail by a *curator bonorum*, who divided the proceeds among the creditors, as far as it would go.

QUESTIONS.

What was *missio in possessionem;* and by whom granted?

Who was the *bonorum emptor?*

How long was the interval between the execution and the sale?

Who was the *magister?*

Who was the *bonorum curator?*

What was the object and convenience of this arrangement?

Title 13.—Of Obligations.

Obligations are of two classes,—natural or moral, and civil or legal: the latter were those only which the law rendered obligatory, by attaching to them a right of action. Legal obligations, again, are divided into civil, and prætorian or *honorariæ*,—the former sanctioned by *leges*, the latter by *edicta;* and were understood to be incurred by contracts (*conventiones, pactiones*), by wrongs (*delicta*), and other casual circumstances (*facta*).

Under the Roman law, an agreement, without certain formal acts or words (*nuda pactio*), could not, of course, come under the cognisance of any tribunal; and the different formalities by which they were made legally binding, being either a symbolical delivery of something (*res*),—*i. e.* a sort of *mancipatio*,—a verbal formula (*verba*), a written contract (*literæ*), or mutual acquiescence (*consensus*), occasioned a corresponding classification of them into real, verbal, written, and consensual.

There were also some contracts which, as they related to the ordinary and established transactions of society (such as sales, loans, letting and hiring), were called by specific names, and involved special actions: while others, arising casually and from exceptional circumstances, were decided according to the analogy existing between them and the former; *and hence arose* another classification, into *nominatæ*, *and pactiones præscriptis verbis*, so called from the

prefixed written statement of the peculiar circumstances under which they arose. Contracts were also further classified into *synallagmatic*, or reciprocal, and unilateral (*i. e.* involving the obligation of both parties or one party); and into those of equity and law (*ex æquo et bono*, and *stricti juris*).

In the case of "real" contracts, the plaintiff, in addition to the special action, could also claim to be indemnified by a *conditio*.

QUESTIONS.

How are obligations classified?
What are civil and *honorariæ* obligations?
How do they arise?
What do you mean by a *nuda pactio?*
How were agreements *præscriptis verbis* adjudicated?
What are synallagmatic agreements?
Had the plaintiff, in a case of *real* contract, any peculiar remedy?

Title 14.—Of Real Obligations.

The obligations arising from all the unnamed (*verbis præscriptis*) contracts were *real;* as were also those incurred by four of the *nominatæ,—senatusconsultum mutuum, commodatum, depositum,* and *pignus;* because, in order to create an obligation in these cases, it was necessary that something tangible should be transferred.

Mutuum (*i. e. ex meo tuum*) was the contract by which a certain quantity of things, numbered, *weighed,* or measured, were lent, in order to be

returned, in the same quantity, to the lender. These were called *res fungibiles*, because they represent each other.

Commodatum was also a loan, differing from the other in this respect, that, in the case of *mutuum*, the property in the thing was transferred to the borrower, who might repay by an equivalent in kind, while the *commodatum* vested in the borrower only the use of the thing, and implied its restoration in actual identity: the consequence of this difference was, that, in the former case, if the thing was lost, or destroyed, the liability of the borrower still remained, while the *commoditarius* was freed from his liability, unless it were proved that the loss resulted from his own neglect. These loans were necessarily gratuitous, because any payment would necessarily bring them under the denomination of *locatio*.

Depositum was a contract under which a thing was entrusted to the care of another for the benefit and convenience of the depositor; and involved rights of action on both sides (*actio directa depositi* and *contraria depositi*), to enforce restitution on the one side and indemnification on the other.

Pignus was a contract (or the subject of a contract) by which a thing was delivered to a creditor as a security for his debt: and in this case, also, two actions were granted (*directa* and *contraria*),—on one side to enforce restitution when the debt was paid, and on the other to enforce compensation for any losses which the keeping of the deposit may have involved.

QUESTIONS.

From what contracts did *real* obligations arise ?

What were the differences between the two forms of loan, *mutuum* and *commodatum?*

How did *depositum* differ from both these ?

Were the above loans generally paid for ?

What right of action had the *depositor* and *depositarius ?*

What was *pignus?*

Title 15.—Of Verbal Obligations.

A VERBAL obligation was created by *stipulatio,* which was a solemn form of question and answer between the contracting parties,—such as, *spondes ? — spondeo ; facias ? — faciam* ; *dabis ? — dabo,* &c.,— and spoken in any language intelligible to the parties. Stipulations were classified as certain and uncertain, accordingly as one undertook to give things of a specified identity, kind, or quality, or to perform, or abstain from performing, acts which could not be specifically defined. The action arising in the former case was the *condictio certi,* in the latter the *condictio incerti,* in which the damages were estimated at the discretion of the court.

Stipulations were also divided into conditional, unconditional, and those *in diem.*

Unconditional stipulations were such as the stipulator might require to have fulfilled immediately, *without being* liable to the objection of plus-petitio.

Stipulations *in diem* were those which created an obligation, but postponed the time of its fulfilment; and in this class were also included those which related to a certain place, for this was understood to imply a certain time: for instance, if a man promised to do a certain thing in Constantinople, it was supposed that a certain time (when he was to be there) was implied.

Conditional stipulations of course created no obligation until the occurrence of the uncertain events on which they depended; until then, the stipulator had merely an expectation, which he could, however, transmit to his heirs, in case the obligation should arise (*si stipulatio commissa fuerit*). If the condition was negative (such as a promise to pay one a certain sum if he did not do a certain thing), no obligation could arise until the conditional event became impossible, *e. g.* until the death of the *stipulator*, — who could not in this case, as in that of a conditional legacy, offer the *cautio Muciana*, in order to take advantage of the stipulation in the meantime. A stipulation subject to an event already past or present, though unkown to the contracting parties, cannot be said to be conditional, because the event either has or has not occurred; if it has, the contract is already in force; if it has not, the obligation can never arise; in either case, there is no condition.

QUESTIONS.

By what formalities were verbal obligations created?

When were stipulations certain, and when uncertain?

What was the effect of the obligation created by an unconditional stipulation?

Was the obligation created by a *stipulatio in diem* equally binding?

How were stipulations relating to particular places understood?

In what case only could a conditional *stipulatio* create an obligation?

What was the effect of a negatively conditional stipulation?

Title 16.—Of joint Stipulators and joint Promissors.

Stipulations might be made between several persons on one side and one person on the other, or between several persons on each side: for instance, a promissor was questioned by several stipulators, and answered them altogether; or, on the other hand, several promissors returned a joint reply to one stipulator; and in this way one joint obligation was created, — for if the question were put to or answered by each separately, there would be so many obligations created. But, although the parties on either side, or on both sides (*rei*), were several, the obligation was but one, and was sufficiently discharged by being paid once for all to or by any one *of the parties* bound. As all were equally bound,

Justinian allowed any one stipulator to sue each of the promissors severally and successively, until the obligation should be discharged.

It was also possible that among the promissors, some might be conditionally, and others unconditionally bound; in which case the latter might be sued, notwithstanding the uncertain nature of the obligation upon the former.

It may be observed that, in cases of *commodatum* or *depositum*, a similarly joint obligation might be created.

QUESTIONS.

Might there be more than two individual parties to a *stipulatio?*

What was the effect of a joint obligation upon each individual party?

What form was it necessary to observe in order to create one joint obligation, instead of several distinct obligations?

By whom and to whom should payment be made in such cases?

Could a joint obligation arise under any other contract?

Title 17.—Of Stipulations with Slaves.

In consequence of the peculiarity of the position occupied by slaves, sometimes representing and sometimes represented by their masters, they could take but one side in making stipulations, and, even so *far, their masters* were virtually the stipulators.

All promises and undertakings made to a slave were for the benefit of the master if living, and for the benefit of the *hæreditas*, of which such slave was a part, after his death. A slave might sometimes stipulate for an advantage or a privilege to be enjoyed by himself personally; but it was the master who could alone enforce the fulfilment of the obligation; and if the slave-stipulator was the property of several masters, they were all entitled to participate in the benefits, in proportion to their several shares in him; unless he acted, in that particular instance, as the agent or by the orders of some one of them, or had expressly stipulated for all alike.

QUESTIONS.

How far might a slave be a party to a stipulation?

What personal interest could a slave have in a stipulation?

How could he enforce the performance of an engagement made to him?

What was the effect of his belonging to several masters?

Title 18.—OF THE VARIOUS KINDS OF STIPULATIONS.

STIPULATIONS are classified into conventional, judicial, prætorian, and common, *i. e.* partly judicial and partly prætorian. The *conventional* were such as were voluntarily created by the contracting parties; and for which the interference of a *judex* or prætor was unnecessary.

The judicial were those stipulations which a judex

alone could order to be made, such as *de dolo cautio*, and *de persequendo servo*. The *cautio de dolo* was a security which the *judex* could order to be given to a plaintiff, that the defendant would surrender to him the thing claimed, without fraud, *i. e.* without doing anything to lessen its value. The other *stipulatio* was one which a *judex* could require from a defendant who was sued for the surrender of a slave; the object of it was to oblige him to pursue the slave who had escaped (and whom it was therefore impossible for him to surrender) or to pay his value (*de persequendo servo, solvendove pretio*), or at least, if he was blameless in the matter, to promise that the slave, if again in his power, should be given up, and to hand over his right of action to the plaintiff.

Prætorian stipulations were those which could be contracted only by order of the prætor or ædile: such as the *stipulationes damni infecti* and *legatorum*. Of these the former (*damni infecti, i. e.*, relating to loss or damage not yet inflicted but anticipated) were intended to oblige the proprietor of anything dangerous to his neighbours (a falling house, for instance) to undertake to indemnify them, or to transfer to them the property in question. The other the *cautio legatorum*, was a security which the prætor at the request of legatees, required of an heir, that he would not injure or waste the property of the testator during the interval preceding the payment of the legacies.

Common stipulations were those which either a *judex* or a *prætor* might order to be made, such as

that *rem salvam fore pupilli*, and *de rato*: of these, the first was a *cautio* (security), by which a guardian and his sureties guaranteed the preservation of a minor's property, and which the judge or prætor could order to be given in court, in order to enable the guardian to sue for the payment of debts due to his ward; for, in default of such *cautio*, the debtor could object to the guardian's right to proceed against him: the other was a security required from a *procurator*, to guarantee the fact of his acting under the full sanction and authority of the party whom he represented; and this, like the former, might be ordered and completed in court.

QUESTIONS.

How are stipulations classified?
What were conventional stipulations?
How did the judicial and the prætorian differ?
What was the object of the *cautio de dolo?*
What was the object of the *cautio de persequendo servo solvendove pretio?*
What was the use of the *cautio damni infecti?*
And of the *cautio legatorum?*
What do you mean by common stipulations?
Can you mention any cases in which they were required?

Title 19.—Of void Stipulations.

Stipulations might be annulled, on account of the *subjects* which they involved, the persons by or for *or between* whom they were made, a defect in form,

and the time for which or the conditions under which they were contracted.

They were void, in the first place, when the subjects were things which had never existed or had ceased to exist, or things which were not *in commercio*, or things which could not possibly be acquired, or acts which were illegal or immoral; and if they had been void in their creation, they could not, according to law, become afterwards valid even by the removal of the obstacles or impossibilities, except in cases where they were conditional; for then, it was only after the removal of the obstacle, that the obligation began to exist.

They were void, in the second place, when one of the contracting parties was a lunatic, or a minor, or deaf and dumb, or subject to the *patria potestas* of the other (their interests being then identical); or when the parties had not personally contracted, *i. e.* when one of the actual parties contracted for a third person; such speculation being void, except the actual stipulator had some interest involved, as, for instance, when a debtor contracted for the payment of money to his creditor,—but then the actual stipulator was the only party who could enforce payment.

They were void, in the third place, when the contracting parties stipulated for different things, as for unequal sums of money; in which case, however, Justinian, following the opinion of Gaius, decided that the stipulation was binding for the smaller sum, or for the smaller number or quantity of anything

promised, on the principle that *omne majus in se minus continet.*

They were void, in the fourth place, when the conditions attached were impossible, or *præposterè conceptæ, i. e.* when the time of the performance was fixed before that of the fulfilment of the condition, or when they were such as could not be fulfilled until after the death of the party or parties; but Justinian allowed such stipulations to take effect according to the intentions of the parties, and the rights which they involved to be transmitted to their heirs.

QUESTIONS.

When were stipulations understood to be void?

What were the subjects of stipulations which rendered them void?

What classes of persons were considered incompetent to be parties to a stipulation?

Under what circumstances might a stipulator contract for a third party?

When the promissor bound himself by a smaller obligation than the stipulator specified, how far was the contract valid, and on what principle?

When was a condition said to be *præposterè concepta?*

Title 20.—Of Fidejussores.

Fidejussores were the collateral sureties who undertook, by *stipulatio*, that other persons would fulfil their obligations. A *fidejussio* might be used to

secure any obligation whatever, and was binding on the heirs of the surety; but the cases in which it was principally demanded and given were those of debt, and the liability of the *fidejussor* was of course always subordinate to that of the debtor.

Several sureties might be bound to secure (*intercedere*) the same debt, and, in case the debtor eventually became insolvent, the creditor might sue any one of them for payment; but in such a case the *fidejussor*, so sued, might claim the benefit of several *beneficia* instituted for his relief. These were called *divisio*, *cessio actionum cedundarum*, and *ordo* or *discussio*. The first of these was a privilege which Hadrian gave to sureties of demanding from the prætor that they should be severally sued only for portions of the whole debt, so that the burden might be divided between them. The second was a provision of the law under which a surety who had paid the whole debt without availing himself of the *divisio* could call upon the paid creditor to assign to him his right of action, in order to compel the other sureties to contribute to him their shares; or to make the original debtor accountable to him; or to secure the benefit of any pledges or *hypothecæ* that might exist. The third was a right which the sureties might use to compel the creditor to sue and obtain from the debtor as much as he could, in order to lighten their obligation so far.

QUESTIONS.

What was a *fidejussor?*

To what sort of obligations might a *fidejussio* be appended?

Was a surety protected in any way by the existence of joint-sureties?

Of what remedies might he avail himself?

What was the effect of *divisio?*

What was the *cessio actionum?*

What was the use of *ordo* or *discussio?*

Title 21.—Of written Obligations.

The origin of written obligations was the ancient practice of keeping accounts in writing of debts, receipts, and expenses: these entries were generally called *nomina arcaria* [hence we find the word *nomina* frequently used in the Latin classics to signify debts and securities], and when the entry related to a contract to pay a certain sum, it was called *expensi-latio*, implying literally that the sum in question had been delivered or transferred. This *expensilatio*, according to Gaius, was a statement that the sum so carried to the debtor's account was due by him on some other transaction, or was the amount of a debt due to him by some other debtor; and it was therefore also called *transcriptio nominis*, a substitution of one claim or one debtor for another. These entries, though originally indicating merely

that an obligation was already in existence, came eventually to be regarded as written contracts.

As the *expensilatio* was peculiar to Roman citizens, there was another form of written contract adopted by the inhabitants of the provinces: this was called *cheirographum*, and was an acknowledgment of a debt and a promise to pay written by the debtor. When it took the form of a contract signed by both parties it was called *syngrapha*. (Cic. Verr. ii. 4. 13. 30. &c.)

It sometimes happened, in consequence of the strictness of the old law, that these written securities were given to usurers before the money was actually handed to the debtor, and that a portion of the money was fraudulently withheld, so that an obligation would be incurred for which only a partial consideration had been given: in order to afford protection to the victims of this system, the Prætorian Law supplied a remedy in the *exceptio non numeratæ* (*pecuniæ*), which obliged the creditor to prove that value had been given. This protection originally lasted for one year, which was extended to five by M. Aurelius; after which the written obligation resumed its full effect.

The changes which Justinian made in this law were, the abolition of the *transcriptio nominis* (*expensilatio*); the exclusive recognition of the *cheirographum* in any form of words, as affording a ground of action; and the reduction of the limitation of the *exceptio non numeratæ* from five to two years.

QUESTIONS.

What was the origin of written obligations?

What is the meaning of the phrase *nomina arcaria?*

What was *expensilatio?*

What form of written security was adopted by *peregrini*, and why?

What was the *exceptio non numeratæ?*

What was the state of the law in Justinian's time?

Title 22.—Of Consensual Obligations.

The obligations under this denomination were those of *emptio-venditio* (buying and selling), *locatio-conductio* (letting and hiring), *societas* (partnership), and *mandatum* (commission). All these might be created without any formalities of delivery or stipulation, and between parties absent or present: they differed also from stipulations properly so called, as far as they were *synallagmatic*, and constituted *ex æquo et bono;* whereas the others were unilateral and *stricti juris.*

In the original state of the law, no obligation but these four enumerated above was considered sufficiently binding to raise an action; all others were *nuda pacta*, — until the Prætorian Law attached actions to some of them, which were therefore called *prætoria pacta.* The Civil Law also instituted actions in connexion with some which were called *legitima.*

Nuda pacta, therefore, which were neither prætoria

nor *legitima*, raised no action; but, if in accordance with law and propriety, they produced an *exceptio* against the suit of the plaintiff. (Book IV. T. 13.)

QUESTIONS.

With what transactions were consensual obligations connected?

How did these differ from other stipulations?

How were *nuda pacta* gradually assimilated with them?

What were *prætoria* and *legitima pacta*, and how did they differ?

Title 23.—Of Emptio-venditio.

A CONTRACT of sale, when completed by a verbal or written agreement between the parties, furnished grounds for two several actions,—one (*ex vendito*) on the part of the seller, the other (*ex empto*) on the part of the buyer. Under the old law it was customary to give "earnests" (*arrhæ*), which were at first merely symbolical of the agreement, but eventually became, by a Constitution of Justinian, a forfeit which was sacrified in case the agreement were broken off by the purchaser; the seller being at the same time liable to a forfeit of double the amount, if he were the retracting party.

A sale might of course be made conditionally, subject to any future contingency, such as the convenience of either party, or the award of some third person; but the price should always be money, for,

when any other equivalent was given, the contract was rather an exchange than a sale. It was of course understood that, until the actual delivery of the thing sold, the seller was the proprietor, and accountable to the purchaser for its preservation during the interval following the contract.

The subject matter of a sale might be anything *in commercio*, either present or prospective; but, in case the thing sold were not *in commercio*, while the seller supposed it to be so, the purchaser was entitled to an action to enforce compensation for the loss of the thing which it was found impossible to deliver.

QUESTIONS.

When was a contract of sale considered complete; and what actions did it authorise?

What was the effect of *arrhæ*?

What should the payment necessarily consist of, and why?

What things might be legally bought and sold?

What was the consequence of selling a thing not *in commercio*?

Title 24. — Of Locatio-conductio.

A CONTRACT for letting and hiring, like the preceding, gave grounds for two actions, that *ex locato* in favour of the contractor, and that *ex conducto* in favour of the hirer. In general the two parties were called *locator* and *conductor*; but these terms were *inverted* when work of any kind was the subject of

the agreement, such as the building a house: in such cases the employer was the *locator*, and *v. v.* The hirer of a house was called *inquilinus*, and of land *colonus*.

In consequence of the great variety of forms assumed by contracts of this nature, and the impossibility of comprehending them under one arrangement, a corresponding number of enactments and regulations became necessary; and these, varying as they did with the several cases, all came under the denomination of *præscriptis verbis*, and gave rise to actions accordingly.

It was sometimes difficult to determine whether these contracts should properly be considered *locationes*, rather than sales or *mandata*,—for instance when two persons agree to lend each other their ploughs and oxen; for a *locatio* should properly be compensated by money, and a *mandatum* was properly gratuitous. Again, when a tenant of land for an annual rent (*pensio*) was entitled to hold it and transmit it to his heirs as long as the rent was paid, the nature of the contract was so doubtful that it assumed the character of a special contract, under the name of *emphyteusis*. This was generally the tenure of the public or crown lands (*agri vectigales*), thence called *emphyteuticarii*.

The terms of *locatio* varied according to agreement, but were in general similar to those of usufruct; and, as such contracts were transmissible to heirs, they were of course binding upon these as upon the original contractors.

QUESTIONS.

What are the meanings of the several terms *locator*, *conductor*, *inquilinus*, and *colonus*?

How should a *locatio* be necessarily compensated?

How did it differ from a *mandatum*?

What was *emphyteusis*?

Did a *locatio* necessarily terminate on the death of a contractor?

Title 25.—Of Societas (Partnership).

Partnerships were of two kinds: *alicujus rei*, involving the profit and loss of particular speculations; and *totorum bonorum*, involving the profits and losses of all transactions in which the partners were engaged. Other kinds also are mentioned: the *societas universorum quæ ex quæstu veniunt* (a partnership in all the results of all the talents and industry of the parties), which did not involve legacies and gifts, and the *societas vectigalis* (for farming the public revenues) among the *publicani;* but these two denominations may be included in the two first.

The shares of the partners, in the absence of any specific agreement, were understood to be equal, but might be apportioned by contract in any way, the industry and skill of one party being sometimes equivalent to the capital of another (*sæpe opera pro pecuniâ valet*): but such an arrangement as this should include the results of the whole partnership; for, if the profits only of one department were taken

into account, the contract was void, as a *societas Leonina.*

A partnership might be dissolved by the death of a partner, for no *hæres* succeeded to a contract of so exclusively personal a nature, and even the surviving partners could not continue to act together without a new contract. It might be dissolved also by the confiscation of a partner's property, or by a compulsory assignment (*cessio*) of, or *missio* (execution) on the goods of a partner, or by the regular close or winding-up of the transactions, or by the expiration of the specified term, or by the express intention of a partner. If the retirement of such partner, however, was a fraudulent or treacherous act, in order to monopolise some advantage which should otherwise go to the "firm," he was liable to an action which would compel him to invest in the common stock all that he had intended to reserve to himself, and the other partner was entitled, by virtue of the *renunciatio* (notice of separation), to the whole profits resulting thereafter to the concern.

The action grounded upon a contract of partnership was called *pro socio*, and its object was to compel a partner to supply to the firm all that he had undertaken, to account for all profits, to contribute his proportion of the expenses, and make good all losses caused by his neglect: but, for any defect in the way of incompetency there was no legal remedy, because all such should have been foreseen and guarded *against by* the other party or parties.

QUESTIONS.

How many kinds of partnership were recognised by law?
How were the shares of the several partners defined?
Were all such partial allotments perfectly legal?
How might partnerships be dissolved?
What was the consequence of a partner withdrawing from a fraudulent motive?
What was the action raised upon contracts of this nature?

Title 26.—Of Mandatum.

A *MANDATUM* was a contract under which one party entrusted and the other undertook a purely gratuitous commission. It was necessary that no recompense should form an element in the contract; for a recompense, if definite, would make it a *locatio*, and if indefinite, a *stipulatio præscriptis verbis;* but it was, at the same time, allowable to give and receive an *honorarium*, or complimentary fee, although it could not be demanded or enforced by any action.

The actions raised by this contract were two; the *actio directa mandati* and the *actio contraria mandati;* the former open to the *mandator* for fraud or neglect, and the latter to the *mandatarius* for indemnification.

The object of a *mandatum* may be either the sole benefit of the *mandator*, or the benefit of both the *mandator* and *mandatarius*, or of some third party, or of the *mandator* and a third party, or of a third party and the *mandatarius*; but the exclusive bene-

fit of the *mandatarius* was not recognised as a legal motive.

The instances of mutual benefit are numerous: for instance, if A commissions B to lend money to C, who is A's agent, B is benefited by the interest of his money, and A is benefited by having the use of the money. Again, if A, who owes money to B, commissions B to extract a promise of payment from C, who owes money to A, both parties are benefited; for A creates a *novatio* by substituting another debtor for himself, and is so far relieved, and B acquires a right of two actions,—first, against the substituted debtor C, under the *stipulatio*, and, if he fails, against A, by virtue of the *mandatum*. A similar benefit results, when A, as a *fidejussor*, commissions B the creditor, to sue C the original debtor, at A's risk; because A postpones his own obligation, and B, though he loses his action against A as *fidejussor* by suing C, acquires another right of action against him as *mandator*, if C has no means of payment.

A *mandatum* might be contracted for the benefit of a third party,—for instance, when A commissions B to transact some business for C; but, in this case, no action could be raised, unless it appeared that A had some indirect interest in the commission, in consequence of his being accountable to C for the manner of its execution.

A *mandatum* might be beneficial to the *mandatarius* and a third party; as, when A commissions B to lend money on interest to C, without having a personal interest in the loan. In this case, an action

might lie against A, if B became a loser; because it might be understood that a guarantee was implied in the commission, although such commission was more generally regarded as an advice.

If a *mandatarius* exceeded his commission, he was liable to an *actio directa*, or at least to bear any losses which he might incur without having any *actio contraria*: for instance, if he paid 150 sesterces, where his commission limited him to 100, he could not, according to the Sabinians, claim any indemnity whatever, and, according to the Proculeians, only the 100.

A *mandatum* might be terminated by the death of either party before the commission was executed; or by a revocation on the part of the *mandator*, the same being duly communicated to the *mandatarius*; or by the renunciation of the *mandatarius*, provided it was dictated by a sufficient motive, such as his own illness, the insolvency of the *mandator*, &c. &c.

QUESTIONS.

What is the exact nature of a *mandatum*?

What were the actions to which this contract might give rise?

What were the several motives by which this contract might be suggested?

Can you mention any instances of mutual benefit resulting from it?

Can you suppose a case in which the *mandatarius* and a third party would be benefited?

Would not such a case be merely a modification of the preceding?

How was the discretion of a *mandatarius* limited?

How might a contract of *mandatum* be dissolved?

Title 27.—Of Obligations quasi ex Contractu.

This name was given to certain obligations which arose without the cognisance or deliberate intention of the parties concerned, and which were, nevertheless, of such a nature that the law gave them the same force as if they had been duly and previously contracted. Under this denomination were included obligations arising from the transaction of one's business in his absence by another party who volunteered to undertake it; from a guardianship; from a *hæreditas, i. e.* being intrusted with the payment of legacies; from the receipt of money paid under a misconception, &c.

The first-named of these obligations (*negotiorum gestorum*) was recognised by the law as a matter of convenience, in order to encourage other parties to attend to the affairs of those who were obliged suddenly to absent themselves, by creating such a claim as might insure indemnification; and establishing a right of action on both sides, the *directa* and the *contraria negotiorum gestorum*, by the former of which the *dominus* was entitled to demand a fair account and conscientious management of his affairs, while the latter insured the *gestor* against losses.

On the same principle the implied obligation between *tutor* and *pupillus* raised an analogous right of action on each side, the *directa* and the *contraria tutela* to insure justice to the ward and indemnity to the guardian. A *curator*, in like manner, had the

actio negotiorum gestorum utilis for the recovery of all his actual expenses.

A similar obligation was understood to exist between the joint proprietors of property in which they were not actually partners. The individual who managed for the rest being accountable to them, and entitled to compensation under an action *de communi dividendo*, and liable to punishment for *lata culpa* (gross neglect).

The succession to a *hæreditas* created, in addition to the obligations by which the testator was bound to creditors, &c., those also which were involved in the payment of legacies, as well as a liability to an action *ex testamento*, which was personal to the heir.

If money was paid by mistake, *i. e.* under an erroneous supposition that it was due, the receiver was liable to be compelled to restore it by a *condictio indebiti*, which was also a personal action; but, when the payer was aware of the non-existence of a debt, the payment was regarded as a gift, and furnished no ground of action.

There were some cases, however, in which the payment of money not actually due did not give rise to personal actions, and some in which no action at all could be raised; for instance, when such payment was made by one incapable of alienating. The property was not regarded as being legally vested in the acceptor, and the action could not therefore lie against him personally, but *in rem:* or when payment was made to avoid or compromise a suit, as in the case of legacies *per damnationem*, and, after Justinian's

time, legacies for ecclesiastical purposes; for, if an heir declined paying these, under an uncertainty of their being due, he might become liable to a *condemnatio dupli*, and compelled to pay double; and if, under these circumstances, he paid them unnecessarily, he had no right of action, because he had made the payment with an object in view.

QUESTIONS.

What were *obligationes quasi ex contractu?*
What was the object of the obligation *negotiorum gestorum?*
To what actions did it give rise?
What were the obligations and actions arising from a *tutela?*
Was a *curator* entitled to any action?
What obligation and action arose from a joint proprietorship?
What action lay against the receiver of money erroneously paid?
Was such receiver in all cases liable to an action?

Title 28. — Of Persons through whom Obligations arose.

The persons through whom one might acquire obligations, that is through whom he might become a creditor, were naturally the same persons through whom he could acquire property (see Book II. Title 9.), viz. *filiifamiliarum*, and slaves either belonging to himself or of whom he had the usufruct or *usus*. The obligations thus acquired involved the right of bringing actions to enforce claims; and this right of ac-

tion was limited by some few exceptions,—for instance, though a *paterfamilias* alone is entitled to bring an action relating to a *peculium adventitium*, he could really enjoy only the usufruct of such *peculium*, for the bare property belonged, by the Law of Justinian, to the son. No obligation could be acquired through a *procurator*, although property might; nor could an obligation arise through a person unconnected with one's family (*extraneus*).

QUESTIONS.

What analogy existed between the acquisition of property and that of obligations?

Were there any, and what exceptions?

Title 29. — Of the Dissolution of Obligations.

Obligations were dissoluble either *ipso jure*, *i. e.* directly, by the Civil Law; or *exceptionis ope*, *i. e.* indirectly, by the prætor extending his protection to the debtor against the action of the creditor.

Under the denomination of *ipso jure*, there were eight several ways in which obligations could be dissolved, — *solutio*, *novatio*, *acceptilatio*, mutual consent, *confusio*, *compensatio*, the accidental loss of the subject matter in question, and *oblatio:* of these the four first were recognised by Justinian. *Solutio* was simply the performance of the contract, or the "payment" of the debt, by the debtor or his representative to the creditor or his representative.

Novatio was the substitution of one obligation or debtor, or creditor, for another (by *delegatio* or *mandatum*); or without the interposition of any third party, by the addition of sureties to a contract; or any other modification made by the two principals in the original agreement.

Acceptilatio was a stipulation which extinguished verbal obligations, and was itself verbal; because obligations could be dissolved only by the same sort of formula by which they had been contracted. It was a species of fictitious payment, in which the creditor replied affirmatively to a question of the debtor inquiring if he were paid; and, by another legal fiction, introduced by the prætor Aquilius Gallus, verbal obligations were substituted for others, and these in turn dissolved by *acceptilatio*. This was called the *Aquilian stipulatio*, and consisted of a long formal ceremony of question and answer.

The dissolution by mutual consent was called *contraria voluntas*, and, of course, dissolved none but consensual obligations. *Confusio*, being the union of both parties in one individual, by inheritance, legacy, &c., of course obliterated all obligations. *Compensatio* was a set-off of one obligation against another, when a debtor and creditor account was kept between the parties; but this did not always, of itself, suffice to extinguish obligations, except in actions *bonæ fidei*; and in *stricti juris* contracts it merely gave the privilege of meeting demands by an *exceptio*.

Oblatio was a tender on the part of the debtor of so much as he admitted of the creditor's demand;

and when this was followed by *consignatio* (a lodgment of the amount in court), the obligation was understood to be dissolved.

QUESTIONS.

How did the old law and the Prætorian Law differ in the dissolution of obligations?

How were obligations dissolved *ipso jure?*

How many forms might *novatio* assume?

To what obligations was *acceptilatio* exclusively applicable, and why?

How was its operation extended?

To what obligations was *contraria voluntas* exclusively applied, and on what principle?

What do you mean by the terms *confusio*, and *compensatio?*

What was the connexion between *oblatio* and *consignatio?*

BOOK IV.

Title 1. — Of Obligations ex Delicto.

Delicta (wrongs) were either public or private,— either relating to the community, and punishable at the suit of any citizen, or relating only to individuals, and punishable only at the suit of the parties affected; and from these, as from contracts, obligations arose in the shape of liability to penalties. All obligations arising in this way were real (*ex re*), for, until the time of Justinian, the mere intention to commit a crime was not considered sufficient to create any liability. Private wrongs were classified into *furtum, rapina, damni injuria,* and *injuria.*

Furtum (theft) was defined to be the fraudulent handling (*contrectatio*) of anything, or of the use or possession of anything for the purpose of profiting by it (*lucri faciendi gratiâ*); so that the crime consisted not merely in the removal of a thing from the proprietor's possession, but in the misapplication of *anything lent,* or deposited, or entrusted, by the proprietor.

Under the Law of Justinian, by which the intention was punishable, it might even happen that the removal of a thing with the full cognisance and consent of the proprietor would constitute a theft; for instance, if A prevails upon B, who is the slave of C, to rob his master and bring the stolen things to A, if B makes C aware of the fact, and if C, in order to convict A, allows the things to be removed, A could not, under the old law, be convicted, either of corrupting the slave, because he had not succeeded in doing so, or of robbing C, because C had permitted the removal of the goods; but, under the Justinian Law, he would be found guilty of both. It was also possible that a man might steal his own property, if he fraudulently removed goods which, as debtor, he had pledged to his creditor.

Theft was either *manifestum*, *i. e.* when the thief was detected in the act or during the removal of the property to its destination; or *nec manifestum*, when committed under any other circumstances. But the old law recognised other denominations, suggested by various accidental circumstances attending upon the detection of the crime.

Furtum conceptum was the name employed when the stolen property was found during an informal search, made by mutual consent in the house of the suspected thief; and the penalty, in that case, was a fine of thrice the value of the stolen goods. It was called *furtum lance licioque conceptum* when the *search was* instituted under sanction of the law and *in due form*, which implied that the owner of the

stolen goods should search in person, wearing only a linen girdle, and carrying a dish, upon which the stolen property, if found, was to be brought away. In this case the penalty was the same as that for *furtum manifestum*, *i. e.* the culprit, if a free man, was scourged, and consigned (*addictus*) to the plaintiff, and, if a slave, was thrown from the Tarpeian rock. This mode of search, and all further proceedings consequent upon it, were abolished by the *lex Ælutia*, and a search with witnesses substituted, which was followed by the proceedings arising after *furtum conceptum*.

Furtum oblatum was the name used when the holder of stolen property, in order to evade a search, conveyed it to the house of another, so that the third party might be implicated. In such cases the third party had an *actio oblati* against the conveyer of the property, who was fined threefold.

Furtum prohibitum and *furtum non exhibitum* were the names respectively applied to cases in which resistance was offered to a search, and where property was discovered by search in the possession of parties who had previously denied the fact. The actions for both these were introduced by the Prætorian Law, and involved a fourfold penalty. But these actions became obsolete under the Law of Justinian, by which the right of search was abolished and the penalty for *furtum nec manifestum* (twofold) imposed upon the receivers of stolen property and upon all who had been accessory to the theft ope et consilio. Such actions, however, could not lie against filiifamiliarum

and slaves who had stolen from their own *paterfamilias*, because their interest was considered identical with his.

It was a principle of the law on this subject, that an *actio furti* belonged to those only or principally who had an interest in the preservation of the property; and by this principle was regulated the form of prosecution in the great variety of cases that might arise. For instance, a person entrusted with another's materials, upon which he was employed to work, was entitled to the *actio furti* in preference to the proprietor, to whom he was accountable in an *actio locati*. Again, when borrowed property was stolen from a *commoditarius*, he, and not the lender, was entitled to the *actio*, for he was accountable to the lender, and was, therefore, more interested in the recovery of the property. The creditor, also, from whom a debtor's pledge was stolen, had the right of action, because it was better for him to preserve the pledge than to exercise his right of action for the debt. But the case of a *depositarius* was different, because he was not, in general, accountable for losses to the proprietor, and there the proprietor alone had the right of action. Further, if a thing were stolen after being sold, but before it was delivered to the purchaser, it was decided by Justinian that, as the plaintiff must be either proprietor or holder, and as the purchaser was neither, the action should belong to the vendor, at least until it was assigned by him to the purchaser. The *bonâ fide* proprietor of a thing originally stolen, if it were again stolen from him,

had the right of action in preference to any other claimant, because it was his interest to make good his title by *usucapio*.

In order to recover stolen property, the claimant had his choice of three several actions,—*vindicatio*, *ad exhibendum*, or *condictio furtiva;* and the *actio furti*, which was purely penal, was of course altogether distinct from either of these.

QUESTIONS.

How are *delicta* classified?

How far did the obligations arising from them resemble those arising from contracts?

What *delicta* were considered private?

How do you define theft?

How many kinds of theft were recognised by law?

What was the origin of the phrase *lance licioque conceptum?*

What was the punishment for *furtum manifestum*, and for *nec manifestum?*

What was the effect of the *lex Ælbutia?*

What was the object of the *actio furti oblati?*

What were *furtum prohibitum*, and *furtum non exhibitum?*

What was the enactment of Justinian respecting the actions in these cases?

What other parties beside the actual thief were punishable?

How many actions, and for what purposes, arose in cases of theft?

Upon what principle was the right of action assigned?

How was this principle applied to the case of a *commoditarius?*

How to the case of a creditor from whom a pledge was stolen?

Whether did the right of action belong to the *depositor* or to the *depositarius?*

How was it assigned between the vendor and purchaser of a *thing stolen* after sale and before delivery?

Title 2.—Of Rapina.

Rapina was a theft aggravated by violence, and originally gave rise to the ordinary actions and penalties for theft; but the prætors, in consideration of the additional outrage, instituted a special action against *raptores*, called *vi bonorum raptorum*, and involving a penalty of fourfold the value (*quadruplum*), at any time within a year after the commission of the act, and of equal value (*simplum*) at any subsequent time, whether the *rapina* was *manifesta* or not.

This action did not originally lie against persons who took forcible possession of property of which they were or supposed themselves to be the proprietors, because there was no *dolus malus* in the act; but, in consequence of the dangerous precedent which such an exemption might afford, the Imperial Constitutions affixed a penalty to forcible appropriation under any circumstances, which was the loss of property to actual owners, and restitution, together with a fine of equal value, when the ownership was imaginary. The assignment of the right of action in this case was regulated by the same principle that prevailed in that of the *actio furti*, being given to those who had most interest in the preservation of the property.

QUESTIONS.

To what actions did *rapina* give rise?

What action and penalty were instituted by the Prætorian *Law?*

How did the Imperial Constitutions regulate the law on the subject?

To whom was the right of action assigned?

Title 3.—Of Damni Injuria and the Aquilian Law.

The *lex Aquilia* was a *plebiscitum* (passed A. U. C. 468) which established actions and penalties for wilful damage to property of various kinds, under the following provisions: —

If a person wilfully, or by culpable neglect, or while performing some act which he had no right to do, injured or killed a slave or beast belonging to another, he was liable to an *actio damni*, which involved a penalty equal to the highest value that such property had borne during the preceding year; and this penalty was estimated, not by the intrinsic value of the property, but by the interest which, for any cause or association, the proprietor had in it. The action, therefore, as it involved a penalty which might sometimes exceed the actual value of the thing injured, was penal, and did not, as such, lie against the heirs of the defendant; as it would, if it were merely for compensation.

The second provision was as follows, in cases of *stipulatio:* if a third party (*adstipulator*), to whom the *stipulator* had assigned his claim on the *promissor*, in order to defraud the *stipulator*, released the *promissor* from his *obligation*, he thereby rendered himself liable to an action.

The third provision related to injuries of any kind, inflicted upon all sorts of property not specified in the first clause, taking cognisance not merely of wilful damage, but, as in the other case, of culpable neglect, and imposing a penalty equal to the highest value which the property had borne during the preceding thirty days.

In all these cases, it was necessary to the raising an action under this law that the injury should be caused by actual contact (*suo corpore*); under all other circumstances, the *actio in factum* for loss or damage suffered was recognised by the prætors.

QUESTIONS.

What was the object of the *lex Aquilia?*

Of what injuries did the first clause of the law take cognisance?

Why was the action penal?

How did penal actions differ from those which sought compensation only?

What was the second clause of the law?

What was the penalty (*condemnatio*) under the third clause?

How should injuries be caused, in order to come under these enactments?

Title 4.—Of Injuria.

This term was technically applied to injuries caused otherwise than by actual contact; such as libels, insulting language, or any attempt to injure the reputation of oneself or his family, such as a wife, a son,

or a slave; and the penalties involved might be claimed by the *paterfamilias*, either as for an injury done to himself, or to the injured party under his protection,—except in the case of a slave, when the injury was always regarded as personal to the master.

An *actio injuriæ* might be either criminal or civil, *i. e.* either for corporeal punishment or for damages.

The civil action (for damages) might be either the *actio honoraria* recognised by the prætors, or that created by the *lex Cornelia*, for assault. Damages were fixed by the plaintiff, and the amount specified might be diminished, but could not be exceeded, by the verdict.

Atrox injuria was the term used when the injury was inflicted under circumstances of aggravation, such as the place, the time, the relative rank of the parties, &c.

The action also lay not only against the aggressor but the instigator; and failed if it were not brought within a year, or if the aggrieved party had, in the first instance, shown that he felt no resentment, or treated the outrage with silence and contempt (*dissimulatio*).

QUESTIONS.

What acts constituted *injuria*?
In the case of slaves, who was regarded as the sufferer?
How was the action for *injuria* to be brought?
What was the *actio honoraria*?
When was *injuria* said to be *atrox*?

Title 5.—Of Obligations quasi ex Delicto.

When injuries were inflicted of a sort or under circumstances not specially provided for by the laws relating to *delicta*, they were the subjects of a general *actio in factum* established to meet such cases, and involved penalties of the same kind "as if" they were definite *delicta*.

The instances of obligations or liabilities of this sort mentioned in the Institutes are, — those of a judge making an unjust decision, through partiality, malice, self-interest, or ignorance; of anything thrown from a house upon the public way, or suspended in a dangerous position; and of thefts or outrages committed at sea or in taverns.

When a judge made a wrong decision he was said to act at his own peril, or to raise a suit against himself (*litem suam facere*), and the party aggrieved by such decision might, according to the Imperial Laws, either demand a new trial (*causam de novo inducere*) or proceed against the judge for compensation; but, under the old law, no second trial of any cause was allowed. Judges were severely punished for ignorance, because they had the right of consulting the *prudentes:* but, notwithstanding their importance to the competent administration of the law, these errors or wilful perversions of justice were not regarded as *delicta*, nor as coming within the operation of the *Aquilian Law*, like injuries arising from the unskilfulness of a surgeon, — because there was no actual

contact (*corpus corpore læsum*), nor any destruction of any corporeal thing; and the only remedy, therefore, was the general *actio in factum.*

When anything was thrown or spilt from a house upon the public way, so as to cause injury to life or limb, the *paterfamilias* inhabiting the house, or part of a house, in question, was liable to a twofold penalty; and if the death of a freeman resulted, the penalty was fifty *aurei* (about 37*l.*).

The action for having anything suspended over the public way in such a manner as to raise apprehension of danger, was *popularis*, and might be brought by any citizen. But, in case of any such action, a *paterfamilias* was not liable for a son who occupied a separate residence, because penal actions were strictly personal.

The master (*exercitor*) of a ship or a tavern, or any house of public resort, was liable to an action involving a penalty of twice the value of anything stolen or damaged in his establishment, even though he might not have been personally guilty; but this action, though it continued open to the heirs of the aggrieved party, did not lie against the heirs of the defendant.

QUESTIONS.

When were obligations said to arise *quasi ex delicto?*
Can you mention any examples?
When was a judge said *litem suam facere?*
What option had the aggrieved party in these cases?
Why was not the incompetency of a judge punished in the *same way as* that of a surgeon?

Who was considered accountable for the damage occasioned by anything thrown or spilt from a window upon the public way?

Was the *paterfamilias* always accountable for the son?

Who was accountable for losses by theft or damage sustained in a ship or tavern?

Title 6.—Of Actions.

The several phases through which the law of actions passed in its progress to the full development of the principle upon which it was founded supply the clearest illustration of the spirit of the changes which the Roman Laws in general underwent, from the early period of forms and ceremonies to the time when these formalities became purely emblematic of the rights which they originally embodied, and from that stage of advancement to the time when, even as emblems, they became inconvenient and obsolete, and were at last altogether abolished.

The term *actio* originally signified the formal process by which the law was set in motion for the purpose of asserting a right; more recently it came to signify the right to sue at law for any privilege or property belonging to one; and then, in a secondary sense, the act, or the manner, of suing. The transition of the term through these several significations is precisely analogous to the process of gradual modification which the administration of the law itself underwent.

The original formalities by which lawsuits were instituted and defended were called *legis actiones*, and consisted of certain words and acts which were so strictly and superstitiously defined that a mistake or deviation, no matter how practically immaterial, from the prescribed form, was fatal to the success of the suit. Of these ceremonies five are enumerated, —*sacramentum*, *judicis postulatio*, *condictio*, *manûs injectio*, and *pignoris capio*.

Sacramentum consisted of the following ceremonies:—The matter in dispute, or a small portion of it, if it could not be all removed, was brought into court; each of the claimants touched it with a rod (*vindictâ*), saying, *Hunc ego hominem*, or *hanc rem*, as the case may be, *ex jure Quiritium meum esse aio, secundum suam causam, sicut dixi. Ecce tibi vindictam imposui.* Then they both laid hands upon it, which was the *manuum consertio*. The magistrate then ordered them to withdraw their hands, saying, *Mittite ambo hominem*, or *rem;* whereupon they challenged each other to deposit a certain sum as a wager, which was to be forfeited by the defeated party, and devoted to religious purposes — hence called *sacramentum*. The sum to be deposited was fixed by the XII. Tables at 500 pounds of brass, when the suit was for 1000 or upwards, and at fifty in other cases.

Then the parties demanded a *judex*, whom the magistrate appointed to investigate the claim after an interval of thirty days, first assigning to one of the claimants the provisional possession (vindicias) of the thing claimed during that interval, on his

giving security (*prædes*) to resign it, in case he should be defeated.

The first innovation upon this form of proceeding was the custom, introduced by the prætor, of allowing the litigants to substitute sureties instead of the actual deposit of the *sacramentum.*

The next innovation was the *judicis postulatio,* by which the appointment of a judge was obtained directly, without the preliminary ceremony of depositing the *sacramentum.*

The next alteration in the law was the introduction of *condictio,* which was an "agreement" between the parties, accompanied by security (*vadimonium*), to appear in court on a specified day, and dispensed altogether with the formalities of a first appearance before a magistrate.

The *manûs injectio* and *pignoris capio,* being merely forms of taking in execution the person and the goods of a debtor, were superseded at a later period by the *missio in possessionem* introduced by the Prætorian Law.

But the most important modification of all was that introduced by the *lex Æbutia,* under the name of *formulæ.* These were written instructions drawn up in each several case, containing the appointment of the judge, and specifying the limits of his jurisdiction and the question which he had to determine; and it was by diversifying these *formulæ,* so as to meet the peculiar circumstances of the several cases, *that the capabilities* of the law were most fully developed.

These *formulæ* were delivered by the proper magistrate (the prætor in the city, the governor in the provinces, and the *duumviri* in the Italian cities), after the summons into court (*in jus vocatio*) and security given to appear, and after the statement of the case (*edictio actionis*) and the decision of the magistrate upon the admissibility of the ground of action. This stage of the proceeding was called *lis inchoata, litis contestatio, judicium acceptum v. constitutum.*

They generally consisted of five parts,—the nomination of the judge, the *demonstratio,* the *intentio,* the *condemnatio,* and the *adjudicatio.* Of these, the *demonstratio* was a statement of the cause of the action, the *intentio* a statement of the question to be decided, the *condemnatio* gave authority to the *judex* to acquit or condemn, and, in cases relating to the division of property, the *adjudicatio* authorised him to transfer to the party entitled.

The statement of the case before the judge was called *causæ conjectio* or *collectio,* the pleadings *causæ peroratio,* and the decision *sententia*—the execution of which devolved upon the magistrate. It will be perceived that, under this system of *formulæ,* the commission of the case by the prætor, &c., to the *judex,* was analogous to our trial by jury; but, as circumstances used sometimes to arise in which the magistrate reserved the decision to himself (which was called a *judicium extraordinarium*), the custom was regularly recognised and sanctioned by Diocletian, and eventually became the legitimate *mode of proceeding.*

QUESTIONS.

Give a general statement of the several changes through which the law of actions passed.

Define the term *actio.*

Enumerate the several ceremonies employed in the original *legis actiones.*

Give an account of the formalities of the *sacramentum.*

What was the *sacramentum*, properly so called?

How was the amount of the *sacramentum* defined by the XII. Tables?

What was the object of the *judicis postulatio?*

What effect had the introduction of the *condictio?*

What is the meaning of the phrases, *vindiciæ, prædes, vadimonium, manûs injectio, pignoris capio, missio in possessionem,* and *manuum consertio?*

What was the *lex Æbutia?*

What were *formulæ?*

Of what parts did they consist?

When were they delivered, and what was that stage of the proceeding called?

What do you mean by the phrases, *causæ conjectio, peroratio, edictio actionis,* and *intentio?*

What were *judicia extraordinaria?*

How did they become *ordinaria?*

Title 6. (continued).—CLASSIFICATION OF ACTIONS.

ACTIONS are classified upon six different principles:—1. With reference to the object, into real and personal; 2. as to their origin, into civil and prætorian; 3. as to their subject, into penal, civil, and mixed; 4. relatively to the amount sought, simple, twofold,

&c.; 5. relatively to the extent of jurisdiction, into *bonæ fidei, stricti juris,* and *arbitrariæ;* 6. those in which the value of the result is restricted by limitations.

1. A personal action (*in personam*) is that in which the plaintiff asserts that a particular defendant, whom he specifies by name, is bound to him under some obligation. A real action (*in rem*) is that in which the plaintiff claims the possession of a certain thing from the holder of it, no matter who he may be, and without naming any particular individual. This distinction is founded upon the terms used in drawing up the *intentio* of the *formula,* and was also conveyed by the names *vindicatio,* synonymous with real, and *condictio,* synonymous with personal action. Again, real actions, as far as they relate to servitudes, usufruct, and *usus,* are divided into *confessoriæ* and *negatoriæ:* the former (the affirmative) are those by which such rights are claimed; the latter (the negative) are those by which the proprietor gratuitously opposed the claim of another, and differed from all other actions in this, that the proof so lay upon the defendant that he became virtually the plaintiff.

2. Civil actions are those established by the old, regularly enacted laws; prætorian were those introduced by the several prætors to mitigate the inconveniences of the former, and forming the *jus honorarium.* Under both these classes there were subdivisions of real and personal actions, i. e. real and *personal civil,* and real and personal prætorian.

The principal real prætorian actions were, — the *Publiciana, quasi-Publiciana,* the *Serviana* and *quasi-Serviana,* or *hypothecaria.* The object of the *actio publiciana* was to protect the rights of those persons who, not being Quiritarian owners, and therefore incompetent to claim by *vindicatio,* sought to recover property which they had lost before their title was secured by prescription (*usucapio*); and this protection, like most others afforded by the prætors, was founded upon a legal fiction, the fiction in this case being that the right had been acquired by prescription. The *actio quasi-Publiciana,* on the contrary, assumed that a title had not been acquired by prescription when in reality it had, and its object was to protect those persons against whom a period of prescription was counted in their absence, and to enable them, within one clear year, to reclaim the property as if no interval of prescription had intervened. This action, however, was superseded by an enactment of Justinian, which allowed the prescription to be interrupted by a memorial or petition to the magistrate, and extended the limitation of time to four years. The *actio Pauliana* had for its object to enable creditors to reclaim property which had been, fraudulently and to their prejudice, alienated by debtors, and was founded on the fiction that the property in question had never been alienated, and had remained all along in possession of the debtor.

The *actio Serviana,* which may be regarded as a *modification* of the preceding, gave the landlord of a *prædium rusticum* authority to sue any parties who

might be in possession of goods liable to be distrained for rent; and the *quasi-Serviana*, which was a sort of supplement to this, gave the creditor in general a claim upon any party holding goods which had been either pledged or mortgaged to him. The difference between a pledge and a mortgage (*pignus* and *hypotheca*), was, that the former being generally a movable thing, was actually transferred to the creditor's possession, while the latter was merely a claim or charge upon property, which, in the case of several *hypothecæ* upon the same property, was allowed to take effect only with reference to the condition of the property at the time when such charge was imposed, —*i. e.* a later charge was not allowed to be paid until the earlier were satisfied, on the principle of *prior tempore, potior jure.*

Of the very numerous personal prætorian actions the most remarkable were those called *constitutæ pecuniæ*, *de peculio*, and *ex jurejurando:* of these, the first was founded upon any additional promise which a debtor added to his ordinary obligation as such,—the term *constitutum* signifying a contract according to the forms of the Prætorian Law, — and was so extended in its operation by Justinian that *pecunia* in this case came to signify any article of commerce or value in general.

The second was an action in which the *paterfamilias* was liable to any claims upon a son or a slave to the amount of their *peculium*, but no further, as they were themselves personally liable to be sued for the deficiency.

By the third the plaintiff and defendant were both obliged to abide by a statement as to the existence of a debt, made by either upon oath, at the request of the other (*postulante adversario*).

There were also several penal actions introduced by the prætors, such as that *de albo corrupto*, for defacing proclamations; that *de in jus vocato vi exempto*, to punish any who used violence in preventing the appearance of a defendant summoned into court. In addition to these, the several *actiones prejudiciales* for determining the *status* (as to liberty, birth, &c.) were, for the most part, of prætorian origin.

3. The civil actions under this classification were so called to distinguish them from penal, and were those instituted for the purpose of recovering lost property or obtaining compensation in general (*rei persequendæ gratiâ comparatæ*).

The penal actions were for the purpose of exacting pecuniary *condemnatio* as a punishment (*pœnæ persequendæ gratiâ*); and by the mixed actions (*mixtæ*) suitors claimed both the thing itself and a penalty for its loss.

Under the first of these three classes were included all the real and most of the personal actions already explained. Of the penal and mixed actions, also, the greater number have been already alluded to; such as, the *actio furti*, which was penal; the *actio vi bonorum raptorum*, and that under the Aquilian Law, which were mixed. The actions relating to the division of property, also (*familiæ* erciscundæ, com-

muni dividendo, and *finium regundorum*), may be considered mixed in some degree,—because the judge was authorised to apportion the shares of the several proprietors, to take from some and add to others, and to enforce the compensation of deficiencies by money payments.

4. As to the amount of the *condemnatio*, actions were divided into those involving single, double, triple, and quadruple penalties, *i. e.* which resulted in penalties twice, thrice, &c. as much as was stated in the *intentio*. Those which involved single penalties were all the actions *rei persequendæ gratiâ*. The twofold penalty was sued for, as already stated, in all actions for *furtum nec manifestum*, all under the Aquilian Law, all actions for corrupting slaves, and all actions for delay in the payment of legacies to religious establishments. The *actiones in triplum* lay against all who demanded more than their due in furnishing accounts, in order to benefit the officers of the court, whose fees (*sportulæ*) were proportioned to the amount of the claim.

The actions *in quadruplum* were those for *furtum manifestum*, for instigation to calumny and defamation, for intimidation, and for demanding exorbitant fees.

5. Actions *bonæ fidei* were those in which the judge was free to decide according to justice (*ex æquo et bono*), while in those *stricti juris* he was compelled to decide according to law. To the former class belonged all actions arising from synallagmatic contracts, to the latter all those raised

by unilateral obligations. It is evident from these definitions that it was only in *bonæ fidei* actions that a set-off (*compensatio*) could be taken into account, because the *jus strictum* recognised no such arrangement as that of nullifying one obligation by another on the opposite side: according to it, every obligation stood by itself, and the judge was not authorised to make any deductions. This system, however, was abolished by Justinian, who enacted that a set-off, when clearly ascertained, should be allowed in all cases whatever, except in the *actio depositi* and that of *rapina alieni*. He also made considerable changes in the *actio rei uxoriæ*, which became thereby a *bonæ fidei* action: he abolished the *actio rei uxoriæ*, properly so called, which admitted some deductions and an interval of time for payment, and modified the other action (*exstipulatio*), between which and the former a wife might make a choice for enforcing payment of her dowry in case of death or other separation, and which was the more stringent of the two, for it enforced immediate payment, and without deductions. This he altered to an action *bonæ fidei* by allowing the husband the *beneficium competentiæ* (*vide infrà*), and an interval of a year for restoring *res dotales*, if movables. On the other hand, he allowed the wife a *hypotheca*, with priority of claim during her own life.

Actiones arbitrariæ, as the name implies, were those in which the judge was authorised to determine at his discretion the terms on which the defendant should be acquitted of his obligation, and to

fix the amount of things which were claimed as indeterminate. Under this denomination were included all real actions, except *petitio hæreditas*, which was *bonæ fidei;* all actions *de dolo malo* and *ad exhibendum;* and all cases of *plus petitio*, which were those in which more was demanded than was specified in the contract, either with regard to amount, or time, or place, or cause of action, — as, for instance, when the plaintiff sued for a larger sum than was due, or an earlier payment than had been promised, or payment in a different place from that specified, or when he deprived the debtor of an option in the mode of payment to which he was originally entitled. In these cases, the penalty under the old law was the forfeiture of the entire claim, except when a *restitutio in integrum* under particular circumstances was granted to the plaintiff. Afterwards, the Constitution of Zeno enacted that, in case of a *plus petitio* of time, the time should be doubled in favour of the defendant, and by Justinian, that, in the other cases of *plus petitio*, the penalty should be thrice the amount of damage caused to the defendant. In cases of *minus petitio*, where of course no penalty was incurred beyond the temporary loss of the difference, the nature of the action authorised the judge to award the whole debt, though a part only had been demanded.

6. The actions in which less than the amount claimed might be awarded were those de peculio, *already explained*; those in which a compensatio was *allowed; and* those in which the beneficium com

tentiæ took effect,—this was a remission made to certain debtors in proportion to the narrowness of their means (*quatenus facere possent*), and was allowed in favour of insolvents who had suffered a *cessio bonorum*, to husbands sued for restitution of *res dotales*, to ancestors or patrons sued by descendants or freedmen, to one partner sued by another, and to donors sued for gifts.

QUESTIONS.

How were actions classified?

What were real and personal actions?

By what other names were they distinguished?

How are real actions classified, when relating to servitudes, usufructs, &c.?

How were actions classified relatively to their origin?

What was the *actio Publiciana?*

What legal fiction was the foundation of the *actio quasi-Publiciana?*

How was this action affected by the Law of Justinian?

To what cases did the *actiones Pauliana* and *Serviana* apply?

What was the difference between *pignus* and *hypotheca?*

What was the *actio pecuniæ constitutæ*, and the origin of the name?

What was the effect of the action *de peculio*, and of that *de jurejurando?*

Can you mention any penal actions introduced by the prætors?

What was the classification of actions relatively to the purpose for which they were brought?

What was the peculiarity of mixed actions?

How were actions classified, with reference to the amount of *condemnatio?*

Can you mention any of those belonging to the several *classes?*

How were actions classified as to the extent of the powers of the judge?

What classification of contracts was analogous to that of actions into *bonæ fidei* and *stricti juris*?

In what actions exclusively was *compensatio* taken into consideration?

What was the enactment of Justinian on the subject of *compensatio*?

What alterations did he make in the action *rei uxoriæ*?

What were *actiones arbitrariæ*?

How did these differ from *actiones bonæ fidei*?

What was *plus petitio*?

What penalties were attached to it at different times?

What was the *beneficium competentiæ*?

Title 7.—Of Actions, direct and indirect.

In addition to the classification detailed in the preceding title, actions are further divided into direct and indirect. Indirect actions are those which may be brought against a person for acts committed by those under his *patria potestas* or acting under his orders or commission; and these assumed six different forms,—*quod jussu, exercitoria, institoria, tributoria de peculio,* and *in rem verso.*

The action *de eo quod jussu,* established, like the other indirect actions, by the prætors, and upon principles of equity, was brought to compel a *paterfamilias* or master to fulfil obligations contracted under his orders by a son or a slave.

The *actio exercitoria* was granted against a party who had procured for a son or a slave an appoint-

ment as master of a ship (*exercitor*), and compelled such party to fulfil obligations which they had contracted in that position.

The *actio institoria* lay, for the same purpose, against the *paterfamilias* or master who had entrusted a son or slave with the management of any business, — such agent being called *institor.*

The *actio tributoria* was granted in cases where a son or a slave had been trading on his *peculium*, and where a creditor complained of being wronged in the distribution between himself and the father or master, which was sanctioned by the prætor for the satisfaction of their several claims.

The action *de peculio* has been already defined.

The action *de in rem verso* was instituted to make a *paterfamilias* or master liable for the contracts of a son or a slave up to the amount of any profit resulting to him from such contracts. This action and the preceding were frequently amalgamated for the benefit of the claimant, who might fall back upon the *peculium* in case the profits of the contract failed to satisfy his demand. In fact, a person having claims upon a son or a slave might, in general, take his choice of these several actions. There were some cases, however, in which a slave could, and a son could not, bind the *paterfamilias;* and others, again, in which the contracts of a son were, and those of a slave were not, binding: for a slave could form no valid contract as a surety, and a son could incur no *legal obligation* as a borrower of money on his own *responsibility.* In contradistinction to all these, the

actions which lay against persons for their own personal acts were called *direct;* but direct actions, in this sense, are to be distinguished from those which are called direct in contradistinction to *contrariæ* and to *utiles* (or analogous) actions: *contrariæ* being those which were granted in certain cases to defendants as a protection against the actions of plaintiffs, and *utiles* being those which were granted in cases resembling those which were specially provided for by the laws.

QUESTIONS.

When were actions called indirect?

How many kinds of indirect actions are enumerated?

State in general terms the objects of all these actions.

Were any of them ever amalgamated?

How did obligations incurred by sons differ from those contracted by slaves?

In how many different senses were actions called direct?

Title 8.—Of Actiones Noxales.

Indirect actions arising from damage or injury caused by a son, or a slave, or a quadruped, were called *noxales*, the agent of the injury, &c. being *noxa*, and the injury itself *noxia*.

These actions were either civil or prætorian in their origin, and gave the defendant the option of paying the *condemnatio* or surrendering the noxa to the *plaintiff*. A slave alienated in this way became the property of the plaintiff, who was, however, com-

pelled by the Prætorian Law to give him his liberty on payment of the *condemnatio;* and the action always lay against whoever might happen, for the time, to be his proprietor. In the case of injury committed by a son or daughter, the option of alienating the *noxa* ceased under the new laws, and the *actio noxalis,* so far as children were concerned, was superseded by an action *de peculio* for the amount of the *condemnatio.*

QUESTIONS.

When were indirect actions called *noxales?*
Define the terms *noxa* and *noxia.*
What option had the defendant in satisfying the plaintiff?
What was the effect of alienating the *noxa?*
How was the right of alienation limited by the Imperial Law?

Title 9. — Of Actio Noxalis in Case of Quadrupeds.

Actio noxalis de pauperie was the name given to that brought to recover compensation for injury or damage caused by any wild quadruped, or by a tame quadruped under circumstances contrary to its natural habits, — *pauperies* signifying any injury done without any evil intention on the part of the agent, as it must be in the case of an inferior animal. In this action the XII. Tables allowed the same option of penalties to the defendant as in the preceding; but the Edict of the Ædiles established another for

injuries committed by wild and fierce animals when not kept under the restraint prescribed by law,—viz., the payment of 200 *solidi* by the proprietor for the death of any freeman, and for any less damage a penalty equal to double its amount; and such penalty might be sued for independently of the action under the old law.

QUESTIONS.

What was the *actio noxalis de pauperie?*
Define the term *pauperies.*
What was the penalty attached to this action?
What were the provisions of the Ædiles' Edict?

Title 10.—Of Representatives in Actions.

Under the old law no man was allowed to plead as a party otherwise than in person, except in an *actio popularis,* or when he was the *assertor* of a slave claimed *in libertatem;* or, in case of *tutela,* when a guardian acted for his ward. Subsequently, the *lex Hostilia* allowed the *actio furti* to be instituted by the representatives of persons absent on the public service or in captivity. Afterwards, when the forms of the law were simplified by the introduction of *formulæ,* representatives were admitted to plead under the several denominations of *cognitores, procuratores,* and *defensores.*

A *cognitor* was admitted to represent a plaintiff or defendant only after a formal ceremony, performed *in court and in* presence of both the principals.

A *procurator* was an agent who was admitted without any preliminary ceremony, in consequence of which the verdict given for or against him did not, as in the case of the *cognitor*, directly affect the principal (*dominus*); and it became necessary, therefore, in order to avoid a new trial, that he should give security (*cautio*), if he represented the plaintiff, that his acts would be recognised by him (*rem ratam dominum habiturum*), and, if he personated the defendant, that he would abide by the verdict (*judicatum solvi*); but eventually a *procurator*, recognised by his principal before the court in any form of words, was allowed to hold the same position as a *cognitor*.

A *defensor* was one who pleaded generally for the defendant; and as the verdict affected directly none but him, he was obliged, like the *procurator in litem*, to give the security described above.

Under the Imperial Law, representation by *cognitores* was discontinued; *procuratores* were allowed to act without any formalities or security, and the sentence directly affected the principal when he had in any way authorised the agency.

QUESTIONS.

In what cases only did the old law sanction vicarious litigation?

What license was introduced by the *lex Hostilia*?

And what under the *formulæ*?

How did *cognitores* differ from *procuratores in litem*?

How did *defensores* differ from both these?

What was the arrangement under the Imperial Law?

Title 11.—Of Securities.

In real actions, under the old law, the system of securities was particularly stringent. It was necessary for a defendant who was entrusted with the provisional possession of the property in question to give security, by *fidejussor*, on the three following points: that he would pay the amount of the penalty, or restore the property; that he would appear in court (*sisti*), and continue to appear there until the end of the trial; and that he would not resort to any fraud. Otherwise, the provisional possession was given to the plaintiff on the same conditions. When the defendant appeared by a representative, it was, *à fortiori*, a matter of course that the same securities should be given. The plaintiff, on the other hand, when suing in person, was not required to tender any security; but when his representative pleaded for him, the security specified in the preceding title was indispensable.

Guardians and *curatores* were obliged to give the same securities as the other (occasional) representatives.

Under the Imperial Law the system of securities adopted may be inferred from the preceding title,—viz., the plaintiff was never called upon for any security when suing in his own person; but his representative, unless when appointed in court or by a public act (*mandatum actio insinuatum*), was liable to the *cautio de rato*. The defendant, litigating in

person, was required to give only the security to remain in court, and, in deference to persons of rank, even this was sometimes omitted. His representative, however, was obliged to give security *judicatum solvi*, and to appear in court to receive the verdict (*quod, tempore sententiæ recitandæ, in judicio inveniretur*); but, if the defendant himself was present, he might become security for his agent (*mandatarius ad litem*) [analogous to the attorney of the present day].

QUESTIONS.

In real actions, what *cautiones* were required of litigants under the old law?

What were the principal securities required of the representatives of plaintiff and defendant respectively?

What was the position of guardians relatively to securities?

Under the new law, what security was required of plaintiffs?

Did the new law give any exemption to defendants?

What was the title corresponding to the modern "attorney"?

Title 12.—Of Actions perpetual and temporary, and Actions for and against Hæredes.

Actions were still further classified, relatively to their duration, into perpetual and temporary.

Originally, such actions as were called civil, in contradistinction to prætorian, were not restricted by *any limitation* of time; but, by the Constitutions of

Theodosius, Anastasius, and Justin, thirty, and in some cases forty, years were the limitation after which the right of action was extinguished. Actions created by the Prætorian Law, on the contrary, if instituted at all, should be brought within a year,—such being the duration of the prætorian authority; but, as the modifications introduced by the prætors began to be gradually embodied in the established law, the actions originated by them were, on the same principle, gradually assimilated to the others in point of duration.

With respect to the liability of *hæredes* to actions which lay against their testators, it must be remembered that it was a fixed principle in law that penal actions were strictly personal, and therefore that no action arising *ex delicto* or *quasi-delicto* could be brought against the heirs of the defendant (though it might, of course, be brought by the heirs of the plaintiff), except when they succeeded to the consequences of an action already in progress, or when they had derived some benefit from the *delictum* of the testator,—and in the former of these cases the liability was transmitted only on the principle that the *litis contestatio* created a *novatio* by substituting an obligation to the law for an obligation to the plaintiff, and that the second obligation was that to which the heir became liable.

QUESTIONS.

How were actions classified with respect to their duration? *What was the* original law of limitation?

How modified by Imperial Constitutions?
What was the duration of Prætorian Actions, and why?
What actions were not capable of being brought against heirs, and why?
Were there any exceptions?
What principle of the law created an exception?

Title 13.—Of Exceptions.

In order to define and account for the use of the term *exceptio*, it is necessary to premise that the old law recognised merely the existence of obligations, without taking cognisance of the circumstances (whether of fraud or sincerity) under which they arose, and that, as the demand of a plaintiff may have been contrary to equity (*iniquum*), while it was perfectly consistent with the law (*justum*), the prætors, who always undertook to mitigate the hardship of the laws which they had to administer, were frequently obliged, in the *formulæ* which they sent to the *judices*, to direct them to find certain verdicts, *except* they should ascertain that there were modifying or mitigating circumstances to be considered; and this restrictive condition, appended to the order to acquit or condemn, was naturally called an *exception*. From this definition it will be evident that, whenever the grounds of defence were to be found in the law itself, it was unnecessary to attach an exception to the *formula*, as, for instance, in *bonæ fidei actions*, where the nature of the action itself was

exceptional, and authorised the judge to take all circumstances into account.

Exceptions, like actions, may be variously classified; and first, they are divided into those *conceptæ in jus* and those *conceptæ in factum, i. e.* raising a question of law and raising a question of fact. By the former the judge was directed to consider the agreement of certain stated facts with the law, and by the latter to ascertain merely whether certain facts were in existence.

Among the great number of exceptions applicable to the various cases arising under the law the following are the most remarkable:—*non numeratæ pecuniæ, jurisjurandi,* and *rei judicatæ.*

The *exceptio non numeratæ pecuniæ* was granted as a bar to an action by which it was sought to enforce obligations for which no consideration had been given, as when a man made a contract to lend money, and, without having actually done so, brought an action to enforce payment.

The *exceptio jurisjurandi* was granted as a protection to a debtor who had sworn to the discharge of a debt, and was nevertheless sued for payment, because, under the old law, an obligation could not be extinguished by an oath.

The *exceptio rei judicatæ* was a bar to a second action on the same account. It was rendered necessary by the circumstance that, in the provinces, and where any of the parties or the judge was an alien, a change of governor put an end to all lawsuits *which should* be afterwards resumed. The action

was, therefore, said to be *imperio continens* (limited to the duration of the magistracy); and when, under Justinian, all the freemen of the empire were placed on the same level as citizens, all actions were assimilated to the *imperio continentes*, and the *exceptio rei judicatæ* sanctioned, in order to prevent the reopening of decided cases. [This principle of the law gave rise to the proverb "*actum ne agas.*"]

Another classification of exceptions divided them into perpetual and temporary. Perpetual exceptions, also called peremptory, were those which continued always in force, so as at any distance of time to bar an action: temporary or dilatory exceptions were those which could be set up only within a certain time, after which they would be unavailable, and which did not, therefore, extinguish, but merely postpone, the claim of a plaintiff. These temporary exceptions, however, if an opportunity offered for setting them up within the limitation, operated thenceforth as perpetual exceptions, because they defeated the action, which could not then be reopened. Exceptions were also called *procuratoriæ*, when they barred actions which were brought by persons disqualified from acting as *procuratores*, such as women and soldiers.

Exceptions were further classified into those *conceptæ in rem* and *conceptæ in personam*. The former attached to the thing itself in question, and might be set up by any or all parties sued with reference to that particular thing; the others protected *individuals only*, and were strictly personal immunities.

Thus an exception which a debtor may set up would be available for his sureties also, because it attached to the contract itself; but an exception which an insolvent might raise would not exonerate his sureties, because the object for which sureties were bound would be thereby defeated.

QUESTIONS.

Explain the origin of the term *exceptio.*

In what class of actions were exceptions unnecessary?

What was the difference between exceptions *conceptæ in jus* and *conceptæ in factum?*

What was the benefit of the exception *non numeratæ pecuniæ?*

In what cases was the exception *jurisjurandi* allowed?

What was the object of the exception *rei judicatæ?*

How did perpetual and temporary exceptions differ?

What were the *conceptæ in rem* and the *conceptæ in personam?*

Title 14. — Of Replications.

A *REPLICATIO* was a statement appended to the *formula* for the purpose of meeting or "replying to" an exception, and bore the same relation to the exception as the exception bore to the action. It was employed in cases where a second contract had been made to confirm the first against the operation of an exception, and was therefore founded upon the second contract (*ex pacto posteriore*). If a third contract had been made, setting aside the second, it gave rise to a further reply called a duplicatio, and

this again might be answered by another called *triplicatio*, and this, in turn, by a *quadruplicatio*, and so on.

The *exceptio doli mali*, alone, gave rise to no *replicatio*, because the nature of that exception authorised the judge to take cognisance of all circumstances arising at any time and influencing in any way the sincerity of the action.

QUESTIONS.

What is a replication?

What analogy exists between exceptions and replications?

From what circumstances did replications arise?

What do you mean by the terms *duplicatio*, *triplicatio*, and *quadruplicatio*?

What effect had the *actio doli mali* upon replications?

Title 15.—Of Interdicts.

The *interdictum* (injunction) was a species of Edict, from which it differed in being addressed to particular individuals and in particular cases; while the *Edict* was a general proclamation relating to the whole community. It was generally and originally of a cautionary or prohibitory character, and took its name from the circumstance of its interfering (*inter duos*) in private and extraordinary cases, especially where any danger to the public interest or peace was apprehended.

The effect and intention of Interdicts was to *render parties* who disobeyed them amenable to the

law in cases where the law could not otherwise reach them.

Interdicts were classified, in the first instance, as *prohibitoria*, *restitutoria*, and *exhibitoria*, of all which the objects are sufficiently indicated by their names; the first being employed to forbid the commission of any specified act, the second to order the surrender of property, and the third to command the production or appearance of any particular person or thing.

They were also employed to enjoin the taking, keeping, or recovering possession of property, and were classified accordingly as *interdicta adipiscendæ*, *retinendæ*, or *recuperandæ possessionis*. Under the first of these three denominations, the principal Interdicts were those called *quorum bonorum* (from the first words of the *formula*) and *salvianum;* the former intended to give possession to heirs who were not recognised as such by the old law, the latter to place the landlord in possession of goods which a *colonus* had pledged as security for his rent. Under the second denomination, the most remarkable were the *interdicta uti possidetis* and *utrubi*, granted respectively for the protection of those who held rightful (*non vitiosa*) possession as regarded the opposite party (*ab adversario*) at the date of the injunction, and of those who had held rightful and undisturbed possession during the greater portion of a year against the opposite party. They were eventually amalgamated. Possession by a representative was, of course, regarded as a valid ground for the Interdict. Under the third denomination, the Institutes mention parti-

cularly the Interdict *unde vi*, which was granted for the protection of persons forcibly dispossessed of immovable property, such as houses or lands, and subsequently extended, by the Constitution of Valentinian I., so as to include movables also. Independently of the Interdict, the party using violence, public or private (*i. e.* with or without arms), to dispossess another, was liable to prosecution under the *lex Julia*. *Quasi possessio* was also protected by the interdicts *uti poss.*, *utrubi*, *unde vi* (*i. e. unde tu illum vi dejecisti*), and others framed specially to meet cases as they arose.

The third classification of Interdicts was into *simple* and *double*, *i. e.* those addressed to one party and to both parties. Interdicts continued to be used as a portion of the machinery of the law until the abolition of the trial by *judices* under the Imperial Law, when the administration of all legal remedies was vested in the magistrates under the one comprehensive denomination of *judicia*.

QUESTIONS.

How do you account for the origin of the term *interdictum*?

What was the secondary object of an Interdict?

How did Edicts and Interdicts differ?

How were Interdicts classified as to their tendency?

Possession being their principal subject, how were they classified relatively to it?

What were the uses of the Interdicts *quorum bonorum* and *salvianum*?

What protection was afforded by the *uti possidetis* and *utrubi*?

What was the use of the Interdict *unde vi?*
By what other enactment was it supported?
How was *quasi-possessio* protected?
What were simple and double Interdicts?
How were Interdicts abolished?

Title 16.—Of Penalties imposed upon rash Suitors.

In order to prevent litigious persons from giving trouble to the tribunals by frivolous and vexatious suits, the privilege of appealing to the law was restricted by oaths in the first instance, and, in case they were defeated, by pecuniary fines, and *infamia*, which was a sort of civil excommunication. A Constitution of Justinian obliged suitors to swear that they believed that they had reasonable and sufficient grounds of action: the fine afterwards imposed consisted of the damages and costs (*impensæ litis*); and in aggravated cases, where a *depositum* had been denied, a *damni injuria* disclaimed, or a delay caused in the payment of legacies to religious establishments, this penalty was exacted twofold and sometimes threefold.

The penalty of *infamia* involved the loss of the civil privileges of giving testimony, of holding public offices, and of making statements for other parties in court, and was inflicted upon those who were condemned in any of the actions *furti, vi bonorum raptorum, injuria,* or *de dolo malo,* or in direct actions *tutelæ, mandati, depositi,* or *societatis.*

In addition to these, a special penalty of 50 solidi

was imposed by the Prætorian Law, upon children and freedmen, who instituted actions against their ancestors or patrons, without permission of the court previously obtained.

QUESTIONS.

By what restrictions was unjustifiable litigation restrained?
What was the oath required by Justinian?
What was the fine inflicted?
What were the consequences of *infamia*?
In what cases was it inflicted?
What special penalty was imposed by Edict?

Title 17.—Of the Duties and Powers of a Judex.

In general terms, the functions of a *judex* were, to give judgment according to the laws (as the Athenian judges: — see Æschines, *de Coronâ*), the *Senatus-consulta*, the Constitutions, and the unwritten law (*mores*); but his duties and jurisdiction in some particular cases, many of which have already come under consideration incidentally in foregoing titles, are more especially defined in this title of the Institutes, as follows: —

The *judex* was bound, in an *actio noxalis*, when he decided against the defendant, to allow him the option of paying the specified penalty or surrendering the *noxa*.

It was his duty, in an *actio in rem*, when he decided against the defendant, and before pronouncing the penalty, to order him to surrender the thing in question with all its accessories, and, if required, to

allow him a reasonable time to do so, on his adducing reasonable grounds for the request, and giving security to the value of the property (*pro litis æstimatione*). The accessories to be surrendered included, in the case of a *bonâ fide* possessor, all the unconsumed *fructûs*, and, in the case of a *malâ fide* possessor, all *fructûs* whatever that had been and that might have been derived. The same decision was enjoined in cases of *petitio hæreditatis*, with a similar distinction between *bonâ fide* and *malâ fide* possessors.

It was the duty of a *judex*, in an *actio ad exhibendum*, to make a decision analogous to the preceding, — viz., if he decided against the defendant, to order the immediate production of the thing in question with its accessories, and to grant time on the same conditions as before.

In an action for the partition of an inheritance (*familiæ erciscundæ*) the *judex* was expected to distribute fairly, without dividing the several things of which it consisted, by condemning the heir to whom he had allotted more than his share to make a pecuniary compensation to the coheir, and to adjudge compensation to any coheir who had expended money on the preservation or management of the estate. In the other two actions for the division of property, *communi dividendo* and *finium regundorum*, the same decision (*mutatis mutandis*) was to be pronounced. In the latter case a penalty for contempt of court (*contumacia*) might be laid upon any party offering resistance.

QUESTIONS.

What was the duty of a *judex*, generally stated?

What was the decision prescribed in an *actio noxalis*?

How was he to decide in an *actio in rem*?

How were *fructûs* and other accessories disposed of?

What was the proper decision in actions for the partition of property?

What was *contumacia*?

Title 18.—Of Judicia Publica.

Judicia publica were trials for offences affecting the welfare of the whole community, not merely because they were of a political tendency, but because they were of an unusual or unnatural enormity, and rendered the perpetrators of them publicly dangerous. For such offences it was competent for any citizen to institute a prosecution, and these prosecutions generally assumed a form different from that of ordinary actions. The prosecutor proceeded by a written accusation (*inscriptio*) sent to the magistrate, who was not, as in other cases, the prætor, but the warden (*præfectus*) of the city, and, in the provinces, the *præses*. These trials were divided into *capital* and *non-capital*, the penalty attached to the former being either actual or civil death, and to the latter heavy fines or corporeal punishment; and were instituted under special laws, framed exclusively for the particular offences.

The most remarkable of these laws, and the crimes and penalties to which they related, are the following:

The *lex Julia majestatis* inflicted the punishment of *death upon* persons condemned of high treason (i. e.

an offence against the state or the emperor), and branded their memories with disgrace.

The *lex Cornelia de sicariis* (passed B. C. 80) inflicted capital punishment upon persons who carried arms (*sica*, a dagger) for vindictive purposes, and upon all poisoners, and sorcerers, and traders in dangerous drugs.

The *lex Pompeia de parricidiis* (B. C. 52) inflicted upon the murderer of any near relative, and upon all instigators and abettors, the strange punishment of being sewn into a leathern sack, with a dog, a monkey, a cock, and a viper, and cast into the sea, or, if circumstances rendered this impracticable, of being burned alive, or thrown to wild beasts. (Juv. Sat. viii. 214.; xiii. 155.)

The *lex Cornelia testamentaria*, or *de falsis*, inflicted the punishment of *deportatio* upon freemen, and of death upon slaves, found guilty of forging wills or other important documents.

The *lex Julia de vi* punished public violence with *deportatio*, and private violence by forfeiture of one third of the offender's property.

The *lex Julia de peculatu* punished the embezzlement of public money, or of any consecrated property, with *deportatio* or a fourfold penalty, in the case of a private individual, and in that of a public officer with forfeiture of life.

The *lex Fabia de plagiariis* punished the crime of kidnapping with a pecuniary fine, for which an Imperial Constitution afterwards substituted capital *punishment*.

The *leges Juliæ, de ambitu, repetundis, annonâ,* and *residuis,* were provided respectively for the punishment of the offences of corrupting voters at public elections, which were continued in the provinces after their abolition in the city by the union of all magistracies in the person of the emperor: of bribery and extortion on the part of judges and civic and provincial magistrates; of fraudulent combinations to profit by the state of the markets and commercial panics; and of embezzlements in the receipt and expenditure of the public revenues.

QUESTIONS.

Of what offences did the *judicia publica* take cognisance?
What was the peculiarity in the proceedings?
What were the objects of the following several laws?
Of the *lex Julia majestatis?*
Of the *lex Cornelia de sicariis?*
Of the *lex Pompeia de parricidiis?*
Of the *lex Cornelia de falsis?*
Of the *lex Julia de vi?*
Of the *lex Julia de peculatu?*
Of the *lex Fabia de plagiariis?*
Of the *lex Julia de ambitu?*
Of the *lex Julia de repetundis?*
Of the *lex Julia de annonâ?*
And of the *lex Julia de residuis?*

APPENDIX.

THE INFLUENCE OF THE CIVIL LAW UPON MODERN LEGISLATION.

THE Civil Law has, like every other science, its internal and external history; the former being the explanation of the subject-matter and doctrines of the science itself; and the latter, the account of its progress to full development and maturity, by the cultivation and successive improvements added by its eminent professors.

As these have been treated in an elementary way in the foregoing pages, it may be desirable to enter more fully into that relation of the science, which to the general reader is perhaps the most interesting and practically useful of all those presented by its external history — its influence upon the legislation of modern European nations, and more especially of our own; for as it has been observed by a celebrated lawyer, the Lord Chief Justice Holt, "Inasmuch as the laws of all nations are, doubtless, raised out of the ruins of the Civil Law, as all governments are sprung out of the Roman Empire, it must be owned that the principles of our law are borrowed from the Civil law, and therefore grounded upon the *same reason* in many things." It cannot be actually *said that the* Civil Law is in force in Scotland, Germany

Holland, or any other modern nation; but it is everywhere the principal source from which their several municipal laws have been evidently derived; and its great interest and value to the mere lawyer, for whom its antiquarian associations may have no attraction, lie not so much in its actual provisions and enactments, as in the broad principles and expansive views upon which those principles are founded, and in the fact of its being what Blackstone has called it, "A system of written reason," from which any civilised nation may derive guidance and instruction. The Civil, or as it was called after its codification by Justinian, the Imperial Law must have been that which governed most of the nations of the known world, during the later ages of the Roman Empire; and in all these it may have left some foot-prints, which may not possibly have been altogether obliterated by the new and pervading system of Feudal Law, introduced by the Goths from Scandinavia, and previously, perhaps, from the warlike and civilised nations of Asia. We know, for instance, that during the occupation of Britain by the Romans, for an interval of more than 360 years, it was governed, as a matter of course, by the Civil Law administered, as in the other provinces, by a regular establishment of Roman tribunals. On the dismemberment of the Empire, the same intellectual darkness that enveloped all other knowledge and literature, obscured that of the Roman Law; and nearly six centuries passed away, before it resumed its influence in Europe. It has been sometimes supposed that it was utterly and altogether lost, and that even the memory and name of such an institution had passed away from tradition, until the year 1127, when, upon capturing the town of Amalfi, the Emperor *Lothaire* found a copy of the Pandects; but this tradition *is not* authenticated by any collateral statements of

history; and it is more probable that it shared the fate of all other branches of human learning, living unseen in secret places, and transmitted to more propitious times by the silent industry of a few studious ecclesiastics. Whether that belief in the legend of Amalfi, however, is justified or not, the fact is, that the early portion of the twelfth century was the time when the knowledge of the Civil Law began to be cultivated in the several nations of Europe. Another supposition which has been sometimes entertained is, that its favourable reception is to be attributed to its utility in aiding the designs and interests of despotic governments; but, although it has been made available for that purpose so far as it forms an ingredient in the Canon Law, it must at the same time be remembered, that the foundation of the system was laid upon a broad basis of abstract justice, at a time when Rome was under a jealously republican government; and that, with the exception of a few innovations introduced by the Emperors for despotic purposes, the changes subsequently made were almost exclusively such as were calculated to simplify the several enactments by divesting them of cumbrous and antiquated formalities. It is nearer to the truth to state, that the sudden popularity which the Roman Law acquired upon its revival, was the effect of its intrinsic value in reforming and refining the semibarbarous system of law then in general use. It must have been naturally expected that a code which had governed the various and extensive dependencies of the old Roman Empire, could scarcely fail to be serviceable to the constitutions of France, Germany, or Scotland. The study of that code accordingly began to engage the attention of some learned men, and several universities, first in Italy, and then throughout the more *northern countries*; and the obvious utility of the system

caused it to be eventually engrafted upon and incorporated with the Feudal and Canon Law, so that almost every constitution of modern Europe may be said to consist of a union of these three celebrated ingredients. Even among the Turks, the Roman Law constitutes the principal source of the national jurisprudence; the Justinian Code, translated into Arabic, forms a subject of instruction in the academies of Stamboul and Cairo, and a necessary part of the education of every *cadi* or judge.

It is in Scotland, however, that we can trace most plainly the influence of the Civil Law, which has been naturalised there to such an extent, that no member is admitted into the Faculty of Advocates, without certifying his knowledge of it by public examination. It has frequently happened that proceedings in the Scottish Courts, otherwise irregular, have been considered legal, merely because they were sanctioned by the Roman Law, which, as Sir G. Mackenzie has remarked, "Is a sufficient warrant to sustain actions in this kingdom, *because of its great equity.*" We read that, in the reign of James V., an action of forfeiture was instituted against an heir, on account of an act of high treason of which his father had been accused; and that, although unsupported by any established local enactment, it was regarded as legal under the sanction of the Civil Law, by which traitors, heretics, libellers, &c., were pronounced incapable of devising property by will. Another, and perhaps still stronger, proof of its influence is the circumstance that, in the time of James VI., an Act for the repeal of certain laws was framed, *non obstante* the Civil Law; *i. e.* although the laws in question were in accordance with it. We have already alluded to the Scottish usage, *founded* upon the maxim of the Civil Law, that laws

may be abrogated by desuetude; and this in its turn was founded upon an obvious principle of common sense; because, as laws are binding only so far as they coincide with the wishes of the community, and may, therefore, be said to be virtually made by nations for themselves, so it is only reasonable that their disapprobation, signified by their ceasing to use them, should be considered an abrogation as virtual and effectual as any act of the legislature for that purpose. This principle has been recognised in Scotland, more especially in the case of laws relating to matters of private right; and so fully and practically recognised, that it was deemed necessary that a law which had fallen into disuse, should be revived by royal proclamation, before it could be again brought into operation. This usage is not recognised in England, and the consequence is, as Judge Barrington says, that many statutes practically obsolete "lie buried in the statute book, till the spleen and resentment of individuals call them forth, to the disgrace of the law and the distress of the person prosecuted;" but the principle upon which the validity of laws is perpetuated in England, is this, that as desuetude or non-usage is merely negative, and as laws are made by a positive act, some positive act is also necessary for their abrogation. This maxim of the English Law received a remarkable illustration so recently as the year 1818.* In an appeal for murder in the Court of King's Bench, the appellee, availing himself of an obsolete but unrepealed law, threw down his glove as a challenge to determine the suit by mortal combat; as trial by wager of battle was still perfectly legal, the judge was compelled to sanction the proceeding, and the other party declining the challenge, the appellee was discharged, and the law immediately altered.

* The case of Abraham Thornton is alluded to.

It will be evident, on reading over the titles of the Justinian Laws, that the differences between our state of society and that of the ancient Romans, must render many of their laws altogether inapplicable to our constitution. Among these the student will of course immediately recognise those relating to the *patria potestas*, substitutions, *possessio bonorum*, and stipulations. Adoption, so frequently alluded to in Scripture and paralleled to some extent by an institution of the German Law called *parificatio prolium*, by which the children of a husband and wife by former marriages are placed on an equality with their joint offspring, is altogether unknown to English Law; and slavery, altogether inconsistent with the English constitution, has transferred almost every provision of the Roman Law to those parts of the American republic where that system is still legalised. One who knows anything of the condition of slaves in America, cannot fail to detect the similarity of their disabilities to those of the Romans; their exclusion from the possession of property and from civil marriage; the determination of the condition of children, as to freedom or slavery, by the condition of the mother; and their incapacity to become parties to a law-suit; all which are borrowed from the Roman Law. It may be observed also, that the institution of *villeinage* under the Feudal Law, was not in any particular much more lenient than the domestic slavery of ancient or modern times.

We may begin the enumeration of the analogies between the Roman Laws and those of our own country, by remarking that, as the former consisted of written and unwritten or consuetudinary law, so the latter also contains the two corresponding elements of the written *or Statute* Law, and the unwritten or Common Law; and *that, as the* Prætorian Law in the one case was the cor-

rection of the hardships of the written law, so in the other we have the Law of Equity to alleviate the operation of the written law, in all cases where, by reason of its generality, it may be unduly severe or defective.

The influence of the Roman Law on the constitution of our Court of Chancery is necessarily, from the origin and circumstances of that tribunal, more extensi ve than may be generally supposed. In the first place, the Chancellors from the time of Thomas à Becket to Cardinal Wolsey (*i. e.* from the reign of Henry II. to the Reformation), were all dignitaries of the Church, who must have been intimately acquainted with the Canon and Civil Law; and secondly, the testamentary business of the Court (which is one of its principal functions, and which was altogether created by the Statutes of Wills under Henry VIII. for the power of devising lands by testament, which existed before the Norman Conquest, was of course suspended under the operation of the Feudal Law) rendered it necessary that the full and explicit provisions of Roman Law should be consulted, as the existing Common Law contained scarcely any enactments or regulations upon questions of that nature. Even the form of trial in the Court of Chancery, may be easily traced to the mode of proceeding under the *formula* system of the Roman Law. The complaint is first made by a bill analogous to the declaration in Common Law, the libel in the Ecclesiastical Courts, and the *libellus* of the Romans; the defendant makes his reply or defence in writing; and this may be followed by a long succession of statements, explanatory and contradictory, on both sides, corresponding with the *exceptio, replicatio, duplicatio, triplicatio, quadruplicatio*, &c., of the Roman actio; for which the English lawyers have the corresponding

terms, of plea, replication, rejoinder, sur-rejoinder, rebutter, and sur-rebutter.

Among the other instances in which the obligations of our modern jurisprudence to the Civil Law can be most easily detected, the most remarkable are those of the laws relating to wills and intestacy, to insolvent debtors; the law of trial by jury, the constitution of the Ecclesiastical Courts, and those of the two ancient universities; together with the rules of the military and admiralty Courts.

With respect to wills or testaments, the privilege of making informal wills *in procinctu*, is paralleled by the licence granted for the same purpose, by the Laws of England, to soldiers and sailors on service, and further extended, on the same principle, to all cases where wills are made by parents for the benefit of children, by uneducated persons, in time of pestilence, and for religious purposes; the object of the indulgence, in all these instances, being to prevent the absence of formalities with which it would have been difficult or impossible to comply, from interfering with the ascertained wishes of the testators. The *heir*, in the Roman Law, was the person who succeeded to the whole real and personal property of the deceased, incurred all his liabilities as proprietor, and was in fact merely a perpetuation of his legal personality; but by the Law of England the *heir* is the person who succeeds to a *real* estate by right of blood; while the party succeeding to a *personal* estate by will, is properly called an *executor*.

The *querela testamenti inofficiosi* (or protest against a will, as being inconsistent with natural affection) is not recognised by the Law of England, where a testator may (unless his property be entailed) disinherit his own *children* and relatives in favour of strangers, if he pleases; *but it is* paralleled, to some extent, by an old custom,

which has been long in force, in the city of London and in York, of reserving a reasonable portion of the properties of persons dying intestate, for widows and children.

A Codicil, in the Roman Law, was an informal will, containing no *institutio hæredis*, and differed from a regular *testamentum* in form and effect; but in English Law, it is merely a postscript to a will, for the purpose of amending, or adding to, its provisions; and may be proved and registered as a will. In the Roman Law, a testator was obliged by the *Lex Falcidia*, to reserve the fourth part of his property from legatees, to his heir; in the English Law, when the property is not sufficient to meet all the bequests, they must be reduced in proportion to the deficiency, in order to satisfy the creditors of the deceased. On the law of wills, it only remains to mention, that the *jus accrescendi* of the Roman Law still continues, under the name of the *right of survivorship.*

The law of intestacy laid down in the Institutes, was subsequently remodelled and almost entirely altered by the 118th Novel of Justinian, and it is by this Novel that the English Courts upon whom the distribution of unwilled property devolves, are principally guided, in cases where their own laws are silent or defective; especially as it abolished all the provisions of preceding laws relating to *institutio hæredis*, and the distinctions between *sui agnati, cognati*, and *emancipati;* and gave the right of succession, first, to descendants, then to ascendants, and next to collaterals. In the English Courts, the degrees of consanguinity are reckoned according to the scale arranged in the Civil Law; and finally, as in the Roman Law the property, for which there appeared no heir or successor, became a res caduca, and passed

into the *Fiscus;* so, in the English Law, under similar circumstances, lands are said to *escheat* to the Crown.

The provisions of the 118th Novel are briefly these:—

1. Descendants of whatever degree, or either sex, excluded all ascendants and collaterals; and the same rule is adopted by the English Law, with an exception in favour of the widow, who is entitled to one-third of property not entailed.

2. Immediate descendants succeeded *in capita*, and remote descendants *in stirpes;* i. e. sons and daughters to equal shares; and each family of grandchildren to the share of one son or daughter; so in the English Law, lineal descendants *in infinitum* succeed to the inheritance of lands; but to other property where all claimants are equally distant, they succeed *in capita* and, when of different degrees, *in stirpes*. The Roman Law, however, recognised no primogeniture, nor preference of sex; while the English Law has retained from feudal times, an exclusive preference of eldest sons in the inheritance of lands.

3. When the nearest surviving relatives were ascendants only, the nearest one succeeded alone; and when there were several of equal proximity, those on the paternal side and those on the maternal side succeeded equally *in stirpes*, i. e. one-half to the paternal ancestors, and the other half to the maternal. By the Law of England, the inheritance of lands could not ascend, until, by a recent Statute of William IV., lineal ancestors, in default of descendants, were admitted to a claim; but to other property a father, in the absence of descendants, succeeds to the whole; a mother with brothers and sisters, to equal shares (*i. e.* a mother to one-half and *brother* and sisters to the other); and grandfathers and *grand*mothers to equal shares, excluding collaterals.

4. When ascendants and collaterals claimed together (as, fathers and mothers with brothers and sisters), they all succeeded *in capita;* and families of nephews and nieces, *in stirpes;* but if an ascendant of the second degree (*i. e.* a grandfather) claimed, with brothers and sisters (a case which could very seldom, but did actually, happen), the words of the *Novella* would seem to imply that they succeeded together *in capita.**

5. When the nearest survivors were collaterals only, or their representatives, brothers or sisters succeeded *in capita;* brothers and sisters, with families of nephews and nieces, succeeded *in stirpes;* and nephews and nieces, if there were no others, succeeded *in capita;* and the Law of England follows the same rule.

The laws under which, both in ancient Rome and modern England, the creditors of insolvent debtors have been permitted to exercise the most absolute power that one human being can hold over another, claim some notice, both on account of their parallelism and their respective features of severity. In the first place, the *old* Civil Law (XII. Tables) assigned to creditors the whole properties and persons of debtors; they could take them into slavery to work for the payment of their debts; and in case there were several creditors who could not otherwise be satisfied, they were empowered to cut the debtor's

* In the frequently quoted case of Evelyn *v.* Evelyn, in which the brother and grandfather of an intestate claimed together, it was doubted what the decision should be according to the Novel, which says:— *Si vero cum ascendentibus inveniantur fratres aut sorores ex utrisque parentibus conjuncti defuncto, cum proximis gradu ascendentibus vocabuntur, si et pater et mater fuerint.* The Dutch Professor Voet was consulted and decided in favour of the brother; and that decision *was adopted by the* English Chancellor Lord Hardwicke, and subsequently incorporated with the Law of England.

body into pieces. By the Imperial Law, however, these atrocities were abolished; and the *cessio bonorum* (analogous to the surrender of a bankrupt), by which debtors were sworn to make a full transfer of their possessions, was substituted. On the same principle of inflicting a criminal punishment for a civil liability, the Law of England, until a very recent date, authorised a creditor, in satisfaction of the most trifling debt, to cast his debtor into a prison from which he could extricate himself no otherwise than by payment, and where the longer he remained, the more difficult and improbable became the recovery of his liberty. The hardships of Roman debtors, as detailed by Livy (*lib.* ii. *cap.* 23.), would not have appeared inhuman to those who were familiar with the scenes of suffering presented in an English prison, before the recent modification of the laws relating to insolvency. On the existence of such laws in the Roman and British constitutions, and their continuance up to an advanced period of enlightened legislation, the most obvious reflections are: that they were calculated, in both cases, to check mercantile enterprise, because men would be naturally slow to engage in speculations where the inevitable consequence of disappointment was a lingering and horrible death; that they were inconsistent with the spirit of other contemporary laws, and with every wise and humane principle of legislation, which should always recognise it as a principal object to repress the operation of such propensities as cruelty and vindictiveness; and that they could have no other effect than that of defeating their own intention, because they placed debtors in a position in which it was impossible that they could make *the slightest* exertion to remedy the mischief which they *had accidentally* or imprudently occasioned.

Bishop Burnet records of Sir Matthew Hale, that "he

set himself much to the study of the Roman Law, though he liked the way of judicature in England by juries much better than that of the Civil Law, where so much was trusted to the judge." This opinion of this great lawyer must have been given without sufficiently recollecting the fact that, among the Athenians, and the Romans, before the introduction of the *formula* system of proceeding, the regular mode of trial was by jury: and a misconception might easily arise from the circumstance that a juror both in Rome and Athens was called, as indeed he virtually was, a judge. In modern times we give that name to the magistrate or officer who receives decisions, explains the law, and pronounces sentence. The Athenian tribunals, for instance the two principal, the Areopagus and Heliæa, consisted of jurors who handed in their several decisions, the majority of which, like the votes of a Scottish jury, determined the verdict. In Rome, the office of judge (in our acceptation of the name) was one of the functions of the king (as it was also in England until the time of Henry II., whence the name of "*the King's Bench*" given to one of the Courts of Law); but afterwards devolved *ex officio* upon the consuls, until the year U. C. 389, when, in order to separate the civil from the military duties of the consulate, the prætorship was instituted. It was subsequently attached to various other magistracies in the city and provinces. These magistrates, like our judges, were invested with *jurisdictio* and *imperium* (the powers of administering the law, and of enforcing its execution); while the *judices*, like our jurors, had merely the *nuda notio* (the right to investigate facts and return verdicts). Again, the presiding magistrate (generally the prætor) had to decide *upon questions of* law, which he did in council, while the *judices merely* investigated matters of fact. Thus while

a question was before the magistrate, to ascertain how the law would take cognisance of it, it was said to be *in jure;* and when it was before the *judices,* to determine whether a certain act had been done, or a certain contract made, it was said to be *in judicio.*

The analogy may be most concisely stated thus:—In Rome, issues on matters of law were determined by the prætor, &c.; and on matters of fact, by the *judices.* In England, issues on matters of law are determined by a judge; and, on matters of fact, by a jury. But under the *formula* system, the offices of magistrate and *judex* (*i. e.* of judge and juror) were combined.

The parallel between the ancient and modern systems may be further illustrated by observing that, as jurors may be challenged in England by either of the litigant parties; so in Rome also, they had the privilege of objecting to the *judices* appointed by the prætor.

The forms of proceeding in the Ecclesiastical and University Courts present a still nearer resemblance to those of the Roman tribunals, and retain in most instances, even the technical nomenclature of the Roman Law. The jurisdiction of the Ecclesiastical Courts extends to cases which are called *Beneficial,* or relating to benefices; *Matrimonial,* relating to divorces, &c.; *Testamentary,* relating to wills; and *Criminal,* relating to such offences as are punishable by bishops, their vicars-general and archdeacons, and involve penalties which either exclusively or principally affect the clergy. In these, as in the University Courts of the Chancellor and Commissary the terms, *citation, decretum, contestation of suit, oath of calumny,* &c. recal, the proceedings of the Roman courts; and, as in the later ages of the Empire, the course of proceeding and trial is not before a jury, but by private evidence and *informations,* i. e. pleadings in writing.

To these several features of resemblance between the Roman and English Laws, it may be added, that the *judicia populi in comitiis* (which was a sort of state trials, such as that of Scipio Africanus, or of Manlius), in which political offenders were publicly arraigned and tried, were as nearly as possible analogous to our Parliamentary impeachments, and trial by the House of Lords, of persons guilty of great public crimes.

Such being the general points of resemblance between our laws and those of the Romans, it remains only to make allusion, in a few words, to the two other bodies of law which, together with the Roman, constitute the sources of European jurisprudence. These are the Feudal and the Canon Law, of which the former has been sometimes supposed to present some resemblance to the Roman Law, and the latter is, to a considerable extent, founded upon it. The Feudal is that system of Gothic Law which became prevalent in Europe, after the fall of the Roman Empire; and having attained its full maturity in the time of Charlemagne, continued for some centuries to regulate the possession of real property (*i. e.* land), in those countries, where it was adopted; and has perpetuated, even to the present time, some traces of its influence.

The etymology of the name is German; the words *feo-hode*, signifying literally, "payment-kind;" and the term, therefore, implying that the tenure was of a stipendiary nature. The distinguishing characteristic of the system was the tenure of lands on condition of military service; and being, as this fact would indicate a code of military law, it necessarily gave rise to several accessory institutions, such as, a Salique law, the order of chivalry, titles of nobility, the relation of lord and vassal, &c.

A variety of theories have been suggested of the origin

of Feudal Law. By some it is attributed to the ancient Germans, and an outline of the system has been found sketched in the 23rd Chapter of the *Germany* of Tacitus. Others have referred it to the Franks. The Lombards (*Longobardi*) have been by others indicated as its authors; because the first digest of it, under the name of *Feudorum Consuetudines*, appeared among them, being the work of two natives of Milan, who lived in the time of Frederick Barbarossa, during the latter half of the 12th century, when an additional section was imparted to the system by the incorporation of some Imperial constitutions termed *Extravagantes*, by which name were designated all such documents as "wander beyond" the limits of a particular collection. The belief in the relationship of the Feudal to the Civil Law has been founded upon the fancied resemblance between the relation of patron and client, and that of lord and vassal; but no two institutions could well be more intrinsically different, for, in the former case, the service was all on the part of the patron. The Roman Emperors did sometimes distribute lands among their disbanded veterans, but it was as a reward for past services and involved no compact; and during the Republic, the perpetually recurring agitations respecting the Agrarian laws, are sufficient proof that nothing of the nature of a feudal tenure could have had existence among them. The fact appears to be that a feudal system might have originated simultaneously in different places; and that it is not necessarily indigenous or of any one country. It was a natural result of the acquisition of lands by conquest, that they should be applotted among victorious soldiers, on condition of military service; and accordingly, with the remarkable exception of the Romans, we *find* an analogy in this respect between nations which *present* no other feature of resemblance. Such a tenure

of land has existed among the Persians and several other Asiatic nations. Among the Turks, the *Timariot Spahis* hold their lands (*timars*) on condition of their serving as cavalry; and in the absence of heirs male, the title is forfeited, and a new grant is made.

The Feudal Law, or at least a more fully developed form of it, was introduced into England by William the Norman. It is probable, however, that it may have been established here, to some extent, long before the Norman invasion; because, from the time of Honorius, Britain had been governed by Danish and Saxon laws, which must have been more or less of a feudal character; but the system was so rigorously enforced by the Normans, and its influences so closely interwoven with the manners and customs of the nation, that many of our present laws, especially those relating to the possession of land, are still, if not actually feudal in their operation, at least essentially so in form.

The reliques of the legislation of the Carlovingian princes (*i. e.* Charlemagne and his successors) are a sort of Imperial rescripts, known by the barbarous name *Capitularia*, which, as their dominions included the different nations of France, Germany, most of Italy, and Spain as far as the Ebro, are understood to have been modified with reference to the established usages of the several countries, and therefore local in their authority and force. It is worthy of remark also, that in the kingdom of Jerusalem, which was established after the second Crusade, in 1099, under Godfrey of Bouillon, the Feudal Law became that of the new realm; and that its details have been preserved in the collection called the *Assises* (or Councils of Jerusalem), which was published in 1690, together with an account of the lois coutumiers

(or, old Feudal Law of France) by Philippe de Beaumanoir, and some other compilers.

The Canon Law is that ecclesiastical system authorised and adopted by the Church of Rome, and exerting a very powerful influence, subject however to some local modifications, in all countries under the spiritual or temporal dominions of the Pope. Its connexion with the Civil Law arises from the circumstance that the latter was the law of Rome during the early ages of the Church; from the Civil Law it borrowed all that could be adapted to its own purpose of aggrandising the Church and the sacerdotal order; and with that element it combined others gathered from Scripture, from the works of the Fathers, from the decrees of councils, and the decretals of Popes, such as those of Gregory IX., and Boniface VIII., the Constitutions of Clement V., and the *Extravagantes* of John XXII. The origin of the system appears to have been the 131st Novel of Justinian, by which the *Codex Canonum* of the Greek Church was confirmed, and which was followed by several constitutions relating to ecclesiastical affairs. As the authority of the Church increased, the influence of the Canon Law, of course, kept pace with its growth, until it reached its acmé in the Pontificate of Hildebrand (Gregory VII.), who first assumed the attribute of infallibility; when it began to take its place, as an important branch of academic study, in all the universities of Europe.

The Canon Law of England comprises legatine and provincial constitutions, with the collections of Pontiffs; and is sanctioned by Parliament, so far as it was received in this country before the time of Henry VIII., and is not contrary to the Common and Statute Laws, and the *Law of royal* prerogative.

QUESTIONS.

What is the internal, and what the external history of a science ?

How far may the Roman Law be considered a portion of the law in some modern nations ?

In what consists its chief value to a lawyer ?

What does Blackstone call the Roman Law ?

At what period and how long was England governed by Roman Laws ?

What is the tradition respecting the discovery of the Pandects at Amalfi ?

About what time did the knowledge of the Civil Law become popular in modern Europe?

Why must it have been favourable to constitutional liberty ?

Of what three elements do the constitutions of most European nations consist ?

How is the Roman Law recognised in Turkey ?

What instances can you adduce of its influence in Scotland ?

Upon what principle is the maxim founded, that laws may be abrogated by desuetude ?

How has this maxim been recognised in Scotland ?

On what principle is it not recognised in England ?

Can you quote any remarkable instance of the effect of the perpetuity of laws in England ?

What are the most prominent differences between Roman and English Law ?

What law resembling that of adoption is in force in Germany ?

What resemblance can you trace between slavery in ancient Rome and slavery in America ?

What institution of the Feudal Law resembled slavery ?

What denominations of English Law correspond to the written and unwritten law of Rome ?

Who were the earliest Lords Chancellors of England ?

Why was it necessary that Chancery lawyers in ancient times should consult the Roman Law ?

What are the English law terms corresponding to *exceptio, duplicatio, triplicatio,* &c. ?

What corresponds in English Law to the testamentum in *procinctu?*

What is the difference between the *heir* of the Roman, and that of the English Law?

Is there anything in our law analogous to the *querela testamenti inofficiosi*?

What is the difference between a codicil in the Roman, and a codicil in the English Law?

What corresponds to the *jus accrescendi*?

What is the authority of the 118th Novel of Justinian, in English Law?

What changes were made by it in the Roman Law?

How are the degrees of consanguinity reckoned in the English Courts?

What are the provisions of the Novel respecting the succession of descendants?

How does the English Law agree with, and differ from those provisions?

How does the Novel regulate the succession of ascendants?

How is it arranged by the English Law?

How did the Novel dispose of simultaneous claims of ascendants and collaterals?

How, of the claims of collaterals of the same and different degrees?

How are these claims regarded by the Law of England?

What analogy is there between the Roman and English Laws relating to insolvent debtors?

What is your opinion of those laws?

Why has it been supposed that the Romans had no trial by jury?

Do you know of any form of trial by jury in Athens?

What is the proper meaning of the term *judex*?

Who were the judges (in the modern sense of the word) in ancient Rome?

What do you mean by *jurisdictio*, *imperium*, and *nuda notio*?

When was a question said to be *in jure*, and when *in judicio*?

What further resemblance may be traced between *judices* and *jurors*?

What are the matters of jurisdiction in the Ecclesiastical Courts?

How does the technical phraseology of these Courts resemble that *of the Roman*?

Is there anything in our law analogous to the *judicia populi?*

What is the Feudal Law? and whence is its name derived?

To what several sources has its origin been attributed?

Why have the Germans and the Lombards, respectively, been regarded as its authors?

What is its real origin?

Why is it improbable that it arose from the Civil Law, or from any Roman customs?

To what institutions did it give rise?

What is its distinguishing characteristic?

What was the cause of the perfection of the system in England?

What do you mean by the terms *Capitularia*, *loi coutumier*, and *Assises de Jerusalem?*

What is the Canon Law? and from what sources is it derived?

What authority did it receive from Justinian?

When did it attain its greatest influence?

GLOSSARY

OF

LATIN PHRASES EMPLOYED IN THE TECHNICAL NOMENCLATURE OF THE CIVIL LAW.

Acceptilatio (i. e. *accepti latio*), "an acknowledgment of payment," or formal acquittance from a debt. The phrase *acceptum referre*, from which it is derived, signifies to make an entry to one's credit in an account-book.

Accessio (from *accedere*), "an addition" made by one substance approaching or adhering to another.

Accrescendi jus, "the right of accruing or receiving an addition," from *accrescere*, to grow upon.

Actio (i. e. *actio in jus*, "the bringing into court," because the defendant was originally brought in person into court, instead of being summoned to attend), a process or proceeding at law, a law-suit, the right to institute law proceedings. The different species of actions were as numerous as the laws under which they were instituted, and the forms prescribed for them varied at different times. The suit of the plaintiff was generally called *actio directa*, relatively to the rebutting case (*actio contraria*) of the defendant; and actions were of course distinguished by various names indicating the purposes for which, the laws under which, and the magistrates before whom they were institnted. For all these, see Book IV. Title 6.

Actus, "the right of driving" a beast of burden or vehicle through any particular place.

Ad tempus, up to a certain time or date. The duration of any pri-

vilege or condition was specified by the words *ex* (from) one stated time, *ad* (to) another.

Addictio, "a consignment, transfer, or handing over" of any property, from *addicere*, "to decide in favour of." *Addictio in diem* signifies a conditional transfer, *i. e.* up to a certain time. See Book III. Tit. 23.

Ademptio, a taking-away, or revocation (of legacies).

Adire, "to approach," or "come to," *i. e.* to become entitled to, to be invested with; *adire hæreditatem*, "to succeed to an inheritance."

Adjectus, "one added," *i. e.* a third party introduced into a contract to act between the principals.

Adjudicatio, "an assignment of property, by a judicial decision on the authority of the *judge*; it differs from *addictio*, which signifies a decision on the authority and in the terms of the *law*.

Adolescens, "a youth," *i. e.* under the age of 25.

Adoptio, "adoption," the act by which a person passed from one family into another. See Book I. Tit. 11.

Adpromissor, "an additional promissor," a third party to a stipulation, who undertook to fulfil the engagement of the promissor, in case he failed.

Adrogatio, literally, a demanding possession; it was a form of adoption used in the case of persons *sui juris*. Book I. Tit. 11.

Adsignatio, an assignment or transfer of the patron's interest in a freedman, made in favour of the patron's son, &c. Book iii. Tit. 9.

Adstipulator, a third party to a stipulation who, in the absence of the stipulator, supplied his place, and bore the same relation to the *stipulator* as the *adpromissor* to the *promissor*. Book IV. Tit. 3.

Adultus, full-grown, arrived at maturity. At the age of 14, young men were released from guardianship; if they afterwards assumed one, they were not released until 25, which was called *perfecta ætas*.

Adversaria, a book in which money transactions were entered as they occurred, a day-book.

Ærarium, the public treasury, the exchequer.

Affines, persons related by marriage; the relationship between a man and his wife's family, or *vice versâ*, was called *affinitas*, and ended when the marriage was dissolved by death or divorce.

Ager publicus, territory acquired by conquest and belonging and paying rent to the state. When it belonged to the nation, it was called *stipendiarius*; when to the emperor, tributarius; and the rent

which was one of the chief sources of the public revenue, was called *scriptura.*

Agnati, persons connected by civil relationship in addition to a tie of consanguinity, distinguished from those related by blood only: *e. g.* all members of the same *familia*, or of the several *familiæ* included in a clan (*gens*); all related by males were *agnati*; those related by females were *cognati* only, *e. g.* grandsons by a daughter.

Agnomen (i. e. *ad-nomen*), a name acquired in addition to the family and personal names, by some merit or accident: *e. g.* Publius Cornelius Scipio Africanus; here *Publius* is the *prænomen* or personal name, analogous to our Christian name; *Cornelius* is the *nomen*, or name of the clan (*Cornelia*); *Scipio* is the *cognomen*, the name of the *familia*; and *Africanus*, the *agnomen*. In the case of adopted persons, the *nomen* of the clan which they left was modified and added to the new name as an *agnomen*. Thus, the son of Paulus Æmilius, when adopted into the *gens Cornelia* among the Scipios, took the name *Æmilianus*; and the Emperor Augustus, on passing from the clan *Octavia* into the *Julia*, was called *Octavianus.*

Alienatio, the act or power of making a thing the property of another (*alienum*). Book II. Tit. 8.

Alieni juris, under the power or control of another person, as a son subject to his father or a slave to his master.

Alimentum, the maintenance granted to a minor under guardianship.

Alluvio, the deposit left by a stream of water.

Altius tollendi (*jus*), the right to raise a building beyond a certain height.

Amita, a father's sister, an aunt.

Amitini, "cousins," the children of a brother and sister.

Antichresis, literally, an equivalent service; a pledge or security deposited for a debt.

Antonina quarta (*pars*), "the Antonine fourth;" i. e. the fourth part of the adopter's inheritance to which a minor adopted by adrogatio, was entitled by an ordinance of Antoninus Pius.

Aquæ et ignis interdictio, "a denial of fire and water;" a figurative mode of banishment. Book I. Tit. 12.

Aquæductus, "the right to draw water" from a river on another's property.

Arbiter, literally, one who acts on his own judgment; a judge appointed to determine cases in equity (*bonæ fidei*).

Arcaria (*nomina*), entries on the debtor side of an account-book, showing that something had been paid or lent (*ex arcâ*).

Arcifinales (*agri*), lands bounded by a moveable limit, *e. g.*, by a river which may change its course.

Argentarius, "a money-dealer, a banker."

Arræ, "earnest money," a sum lodged as a security for the validity of a contract.

Assertor, "a claimant," one who demanded the liberty of a slave in court; the ceremony was called *assertio libertatis*, or *in libertatem*. Book I. Tit. 5.

Atavus, "a great-grandfather's grandfather" (i. e. *alter avus*).

Atrox (*injuria*), "a violent or aggravated assault." Book IV. Tit. 4.

Auctoritas, "sanction; the power of giving permission, or of acting at discretion.

Avia, "a grandmother."

Beneficium, "protection;" *e. g.* (*legis*), the protection of a law; (*inventarii*) secured by taking an inventory, &c.

Bes (*be-as=binæ partes assis*), a fraction of an *as*, eight *unciæ*, or twelfths, *i. e.* two-thirds.

Bonitaria (*possessio*), a right of property or possession under the *jus gentium*, expressed by the phrase *in bonis habere*, protected by prætorian law, and distinguished from *Quiritaria possessio* which was conferred by Civil Law.

Bona, goods, possessions, property.

Caduca (*bona*), literally, "falling from the hand;" *i. e.* property which was intercepted by the Julian Laws from unmarried and childless persons, who would under the Civil Law have inherited it.

Calumnia, libel, frivolous or vexatious grounds of an action.

Canon, literally, "the tongue of a balance;" hence, a standard or fixed measure; in law, the rent paid for land under a lease for ever.

Caput, literally, "a head;" an individual, personality recognised by law; so, a slave was said to be *nullum caput*.

Causâ datâ, causâ non secutâ, a formula signifying, as the words imply, that the consideration or intention for which a certain thing has been done, has failed.

Causa, a motive, pretext, ground: as, *causa justa*, a legal ground; *causa lucrativa*, a profitable consideration.

Cautio, a security, guarantee; also called *satisdatio: e. g. cautio de dolo*, security against fraud. An oath, regarded as a security, was called *cautio juratoria*.

Centenarius, one who possesses 100 *aurei* (gold coins), each worth about 16*s*. 4*d*.

Centumviri, "the hundred men;" a permanent tribunal constituted by election, and consisting of four courts, to which the prætors used to refer law and equity cases.

Centuriata (*comitia*), see Introduction.

Cessio, "a surrender, or yielding up:" as, *cessio in jure*, "a surrender in court;" one of the forms by which possession was obtained under the Civil Law. *Cessio bonorum*, "a surrender of property. *Cessio actionum*, "a surrender of claims, or rights of action."

Cestui que trust, "the person for whom a trust is made," called in Latin *fideicommissarius*. These words belong to the old language of England, as it was spoken soon after the Norman Conquest, when the French of that time and the Saxon were blended into into one language.

Chirographa, "written by the hand;" technically, a written acknowledgment of a debt. Book III. Tit. 21.

Codex, any written document drawn up with certain formalities; as a will, or account-book.

Codicillus (dimin. of *codex*), a smaller or less formal document. Book II. Tit. 25.

Cœlebs, "unmarried."

Coëmptio, "the act of buying up, buying any exclusive right." One of the forms of marriage, by which a man figuratively bought his wife. Book I. Tit. 10.

Cognati, see *Agnati*.

Cognitor, "an agent, or representative," formally appointed to act in law-suits. Analogous to an attorney in our time.

Cognomen, see *Agnomen*.

Collatio bonorum, "a communication or bringing together of property." Book III. Tit. 1.

Collegetarii, "joint legatees." Book II. Tit. 20.

Colonus, "a tenant."

Commercium, "the right of buying;" i. e. of acquiring property. one of the privileges of the *Jus Quiritium*.

Commissoria (*lex*), a law by which sales were made conditional upon payment within a certain time.

Committitur Stipulatio, "the contract is fulfilled, the obligation lies;" a phrase implying that the terms of a conditional contract were fulfilled. Book III. Tit. 15.

Commixtio, "the blending together" of dry substances; distinguished from *confusio*, "the mixture of liquids."

Commodatum, "a thing lent," a loan.

Commodans, "a lender."

Commoditarius, "a borrower."

Communi dividendo (*actio de*), a suit for the partition of a property held jointly by persons not partners. Book III. Tit. 27.

Compensatio, "a set off;" as when a debtor had a demand upon his creditor. Book III. Tit. 29.

Comperendinatio, "an adjournment" of a suit. The day to which it extended, was called *dies comperendinalis*. Book IV. Tit. 6.

Condemnatio, "a fine, a penalty;" or the power of sentencing vested in a judge.

Condictio, an action *against the person* of the defendant, claiming that he is bound to do or to give something. It was called by various names relatively to the purposes for which it was instituted: *e. g. condictio certa*, when the thing was specified and defined (Book III. Tit. 14.); *condictio furtiva*, for theft, when the thing stolen was destroyed, and a personal action necessary.

Conductor, "one who hires" and contracts to pay for the use of any thing; the other party was called *locator*; but in the case of contracts for work to be done, these terms were apparently inverted, the employer being called *locator*. Book III. Tit. 24.

Confarreatio, "the sharing of the cake;" a figurative ceremony of marriage, in which the parties broke and divided a cake between them.

Confessor in jure, "one who makes an admission in court" of his liability to the demand of the plaintiff.

Confusio, see *Commixtio:* also, "an identification;" as when two conflicting rights or interests become vested in the same person.

Connubium, "the right of intermarriage" between different classes or nations.

Consanguinei, children of the same father; those of the same mother

being called *uterini*; and those of the same father and mother, *germani*.

Consensus, "mutual agreement;" a mode of contracting a marriage without ceremonies.

Consignatio, the lodgement in court of a debt offered by the debtor and refused by the creditor. Book III. Tit. 29.

Consobrini, "cousins," being the children of two sisters (i. e. *consororini*).

Consolidatio, "the identification," by which a tenant became landlord. Book II. Tit. 5.

Constitutum, "a guarantee," given without a formal contract.

Contractus, "an agreement" rendered valid in law by involving an action. For the several denominations, see Book III. Tit. 13.

Contubernium, marriage between slaves.

Conventio, "an agreement," without the formalities which constitute a contract.

Convicium, any public insult.

Copiam sui facere, "to be accessible," to appear in court.

Constipulatores, "joint stipulators" to the same contract. Book III. Tit. 16.

Cretio, "growth, time to grow;" *i. e.* the limitation of time which a testator fixes for his heir to accept the inheritance.

Culpa, "neglect;" *i. e.* a negative neglect, the fault of omission: the degrees recognised by law were; *culpa lata*, *latior*, or *magna*, "gross neglect;" and *culpa levis*, "slight neglect."

Curator, "a guardian" of the property; differing from *tutor*, who was a guardian of the person.

Curia (a Greek word signifying "stated," or "periodical"), a subdivision (one-tenth) of one of the three original tribes, met in council; lastly, the senate-house.

Damnum, "damage, loss, injury" for which compensation was awarded by law (Book IV. Tit. 3); *damnum infectum*, "imminent danger," i. e. damage not yet done but apprehended.

Dare, "to give;" in law, to transfer property: if for the payment of a debt, it was called *datio solvendi animo*, a transfer for the purpose of paying; if to receive an equivalent, *datio contrahendi animo*, a transfer for the purpose of creating an obligation; and if through *mere liberality*, *dono datio*. Book II. Tit. 7.

Decreta, *decisions* made by the Emperors in their capacity of judge

Deditícii, "surrendered at discretion;" applied first to public enemies, and in a secondary sense to those foreigners who did not enjoy, and to those citizens who had forfeited civic privileges.

Defensor (*idoneus*), a trustee to whom the property of an insolvent testator was consigned, in order to effect the enfranchisement of slaves (Book III. Tit. 11); or an agent who represented and pleaded for absent parties to a suit. Book IV. Tit. 10.

Demonstratio (*falsa*), "an erroneous description" of property in a will.

Demonstratio, "a statement" of the ground of an action. Book IV. Tit. 6.

Deportatio, "banishment to" a particular place, involving the loss of citizenship. Book I. Tit. 12.

Depositarius, "the holder of a deposit." Book III. Tit. 14.

Depositum, a contract by which one man kept and gratuitously preserved the property of another.

Destitutum, property abandoned by the owner and regarded as having never been appropriated.

Determinatio, a logical definition (*i. e.* containing the essential difference) of property bequeathed.

Deunx, eleven *unciæ*, or eleven-twelfths (i. e. *dempta uncia*) of an *as*,

Dextans, ten *unciæ*, or ten-twelfths, or five-sixths (*i. e.* dempta sextans) of an *as*.

Dictio dotis, a verbal contract which secured to a husband his wife's dowry.

Dies cedit, "the day or the time is passing;" a phrase signifying that a legatee was entitled to his legacy; *dies venit*, "the day has come," signified that it was now payable. Book II. Tit. 20.

Diffarreatio, a ceremony by which the marriage by *confarreatio* was dissolved.

Dilatoria (*exceptio*), a "postponing" bar to an action which stood only for a certain time. Book IV. Tit. 13.

Diminutio capitis, "a diminishing (loss or degradation) of legal personality." For the three degrees or forms of it, see Book I. Tit. 16.

Discussio, "a breaking-up;" a protection or privilege by which sureties could compel creditors to exact the utmost from a defaulting debtor, and thus break up, or divide (*discutere*) the obligation. *Book III.* Tit. 21.

Dispensatio, an extraordinary licence, or exemption from legal restrictions, generally granted by the Emperor.

Divisio, "a division;" the protection which saved any one of several sureties from being made liable to the whole obligation. Book III. Tit. 21.

Dodrans, nine unciæ, nine-twelfths, or three-fourths (i. e. *dempta quadrans, minus* one-fourth) of an *as*.

Dolus, fraud, deception, prejudice, detriment.

Dominium, "ownership." For the several rights which it involved, see Book II. Tit. 1.

Dominus, "an owner, a proprietor," as distinguished from a tenant, &c.

Donatio, originally, "a gift," or "transfer;" subsequently, an agreement or obligation to give, or transfer. For the various forms, see Book II. Tit. 7.

Dos, "a dowry," sometimes repaid as "a jointure." Book IV. Tit. 6.

Dupli, "double, two-fold;" applied to penalties, &c.

Duplicatio, "a reply," or "rejoinder" to a *replicatio*. Book IV. Tit. 14.

Dupondius, "consisting of two pounds," or two portions, each of which was regarded as a unit, or *as*. Book II. Tit. 14.

Edictio (*actionis*), "a statement," or "declaration" of the particular form of action to be instituted by a plaintiff. Book IV. Tit. 6.

Edictum, "a proclamation" of the prætor, see Introduction.

Emancipatio, "a setting free," the ceremony by which the *patria potestas* was dissolved. For the several forms, see Book I. Tit. 12.

Emphyteusis, "the act of grafting on," or "incorporating with;" a sort of special contract, for which see Book III. Tit. 24.

Emptio (*bonorum*), a form of taking in execution. Book III. Tit. 12.

Emptio (*venditio*), "a sale" regarded as a contract. Book III. Tit. 23.

Emptor (*familiæ*), "a purchaser of an estate;" an heir who was instituted by the formality of a figurative sale. Book II. Tit. 10.

Exceptio, a bar to an action or execution. For the several kinds, see Book IV. Tit. 19

Exercitor, "the worker," or master of any establishment for public accommodation, as a ship, a tavern, &c.

Exhæredatio, "the act of disinheriting." Book II. Tit. 13.

Existimatio, "valuation, dignity, rank;" the combination of qualities constituting a citizen.

Expedit reipublicæ, "it is for the good of the state;" a formula signifying the limitation of the absolute rights of property. Book I. *Tit. 8.*

Expensilatio (i. e. *expensi latio*), "an entry of payment made," carried by a creditor to a debtor's account. Book III. Tit. 21.

Expromissor, a new debtor substituted for, and against the consent of the original one. Book II. Tit. 29.

Ex tempore, beginning or running "from a time" specified.

Extraneus, "a stranger," one not a relative.

Falcidia Lex, "the Falcidian Law," for the protection of heirs. Book II. Tit. 22.

Familia, "a family, an estate;" the whole property or domestic establishment of one man.

Familiæ erciscundæ (*actio*), a suit for the partition of an inheritance.

Feræ, "game, wild animals," not regarded as subjects of permanent possession. Book II. Tit. 1.

Fidei-commissum, "a trust;" property confided to one man for the benefit of another. For the forms, see Book II. Tit. 24.

Fidei-commissarius, the person for whose benefit the trust is made.

Fide-jussor, "a surety," see Book III. Tit. 20.

Fide-promissor, "a surety;" originally differing from, but eventually identified with the preceding.

Fiduciarius, "a trustee."

Fiducia contracta, a contract by which the restitution of a trust was secured.

Filius-familias, a son under the power and possession of his father. Book I. Tit. 8.

Fiscus, the private treasury of the Emperor, the privy purse, eventually amalgamated with the *ærarium*.

Fœnus unciarium, literally "the fractional interest." The rate of interest fixed by the XII. Tables at 8⅓ per cent.

Formula, a system of instituting and prosecuting suits, introduced by the *Lex Æbutia*, and explained in Book IV. Tit. 6.

Fraus, "fraud, damage in general."

Fructus, the produce of land or cattle, the profit of any possession or calling; literally, "enjoyment."

Fundus, "a farm;" *instructus*, or *cum instrumento*, "stocked," supplied with all conveniences, &c. See Book II. Tit. 20.

Fungibiles res, "exchangeable things;" things valued by weight, measure, or number. Book III. Tit. 14.

Furiosus, "a lunatic,"

Genus, "kind," or "class;" a term applied to legacies in which things were not individually specified. Book II. Tit. 20.

Gentiles, members of the same *gens*, or clan.

Germani, children of the same father and mother.

Habitatio, property in a house, "the right to inhabit."

Hæreditas, a succession, the right to inherit, or the rights inherited. Book II. Tit. 10. 19. Book III. Tit. 1.

Hæres, "an heir, successor." For the different kinds of, see Book II. Tit. 10. 19. Book III. Tit. 1.

Hæreticus, "a heretic," could not be a legatee by the laws of the Christian Emperors. Book III. Tit. 9.

Honorarium, "a fee;" *honorarium jus*, law promulgated by curule magistrates.

Hypotheca, a charge upon property, a mortgage.

Imperium, the right of a magistrate to enforce his orders.

In bonis esse, "to be among one's goods," to be part of one's property.

Infamia, civic "degradation," affecting one's *existimatio*. Book I. Tit. 26.

Infans, "an infant;" a minor under the age of 7 years.

Inficians, "one who denies;" a defendant denying the charge or demand brought against him.

Ingenuus, "free-born." Book I. Tit. 4.

Injuria, an insult, an assault, any act contrary to justice. Book IV. Tit. 4.

Inquilinus, literally, "a tenant;" a person naturalised in any country.

Insinuatio, "registration" in the public records.

Institutio, the appointment or nomination of an heir.

Intentio, a portion of the *formula* stating the claim of the plaintiff. Book IV. Tit. 6.

Intercedere, to become security for a debtor; literally, "to come between."

Interdictum, "an injunction, a prohibition," a command to do or refrain from doing something. For the different kinds of, see Book IV. Tit. 15.

Interruptio, the suspension of a right or privilege.

Intestatus, "intestate;" one who makes no will, or an invalid or ineffectual will. Book III. Tit. 1.

Iter, the right of passing through. Book II. Tit. 3.

Judex, "a judge;" the officer to whom the prætor referred cases for decision, *i. e.* a juror.

Judicatum solvi, "that the verdict shall be carried into effect;" the form in which a *defensor* was bound. Book IV. Tit. 11.

Judicia publica, *criminal prosecutions*, which any citizen (and not the aggrieved parties only) might institute. Book IV. Tit. 18.

Judicium, the office or authority of a *judex*, a prosecution, an action, a trial. See Book IV. Tit. 6.

Junia Norbana (*Lex*), the Law of Junius Norbanus for the protection of freedmen. Book I. Tit. 5.

Jurisdictio, the power to declare and administer the law, one of the functions of curule magistrates.

Jus, justice in the abstract, law or a system of laws, a right or privilege founded on justice or law, a court of law.

Latini, "the Latins, the people of Latium;" persons possessing the political rights enjoyed by the old colonists of Latium; *Latini Juniani*, freedmen admitted to those rights by the *Lex Junia Norbana*.

Legatorum cautio, the security given by an heir to the legatees under the same will. Book III. Tit. 18.

Legitimus, authorized, appointed, established, or defined by the law.

Legitimarius, a person entitled by law.

Lex, "a law." Laws were distinguished by the names of the proposers, or by those of the subjects to which they related, or by both: as, *Lex Cornelia de falsis*, "the Cornelian Law respecting forgery;" *Lex Fusia testamentaria*, "the Fusian Law respecting wills;" *Lex Julia de ambitu*, "the Julian bribery Law;" *Lex Plautia de vi*, "the Plautian Law on riots," &c. &c.

Libellus, a written statement, a petition, a memorial, any document in writing.

Liberi, "children, descendants."

Liberti, "freedmen, emancipated slaves." So called relatively to *their* patrons, but *libertini* relatively to all other *ingenui*.

Libripens, "a salesman," one who weighs in scales; the person who presided at the ceremony of emancipatio. See Book II. Tit. 1.

Litem suam facere, "to make the cause one's own;" a phrase applied to a judge who acted at his own peril in making an unjust decision. Book IV. Tit. 5.

Litis contestatio, or, *lis contestata*, "the formation of the suit;" the stage at which the preliminary statements were completed. Book IV. Tit. 6.

Litis æstimatio, "the valuation or taxing of the penalty" awarded against a defendant.

Locator, see *Conductor*.

Magister, the assignee of an insolvent debtor. Book III. Tit. 12.

Mancipatio, "taking in the hand;" the figurative mode of receiving possession under the old laws. Book II. Tit. 1.

Mancipium, "a slave," because originally *manu-captus*, a prisoner of war; property in general.

Mancipi and *nec mancipi res*, things transferable with and without the formality of *mancipatio*.

Mandatum, a commission gratuitously undertaken.

Mandatarius, the person by whom it was undertaken. Book III. Tit. 26.

Manumissio, "a setting-free from the hand;" one of the forms by which slaves were liberated. Book I. Tit. 4.

Manus, "the hand;" the authority of a husband over his wife.

Manûs injectio, "the laying-on of the hand;" a form of taking possession, or taking the person in execution.

Materfamilias, a woman who was the head of a family. Book I. Tit. 9.

Memoria damnata, the memory of one condemned, after death, of high treason, and considered intestate. Book III. Tit. 1.

Merces, "payment;" the consideration specified in a contract.

Missio in possessionem, "a putting in possession;" the assignment of a debtor's goods for the benefit of creditors. Book III. Tit. 12.

Modus (of a legacy), the purpose or motive for which it was made Book II. Tit. 20.

Mora, "a stay of execution;" the interval between summons and appearance.

Mutiana cautio, the security of the Law of Mutius given by the receiver of a conditional legacy, that the condition shall be fulfilled. Book II. Tit. 20.

Mutuum, "a loan;" "literally, a transfer" (*ex meo tuum*); the contract by which a lender was secured. Book III. Tit. 14.

Negotiorum gestorum (*obligatio*), the liability of a person whose business was managed by a voluntary agent in his absence. Book III. Tit. 27.

Nexum, "a thing bound, a bond;" any transaction or obligation in the form of *mancipatio*.

Nexus, "one bound or enslaved;" a debtor whose person and property were transferred in pledge to his creditor.

Nomen, "a name;" an entry in a ledger, a security for money.

Novatio, "a renewal;" the substitution of one liability or obligation for another. Book III. Tit. 29.

Noxa, the person or thing causing or doing any damage. Book IV. Tit. 8.

Nuncupatio, "a declaration, specification by name;" the declaration of a testator under the old law, when wills were made in public. Book II. Tit. 10.

Oblatio, "a tender;" one of the modes in which obligations were extinguished. Book III. Tit. 29.

Oblatio curiæ, election into the senate of a municipal town. Book I. Tit. 10.

Obligatio, a tie by which one was bound to fulfil a contract, under liability to a personal action. For the several kinds of, see Book III. Tit. 13.

Occupatio, the taking possession of property which had no previous owner.

Onerarius (as distinguished from *honorarius*), the acting or managing *tutor* or *curator*.

Onerosa (*causa*), "an unprofitable interest" (in a legacy).

Operæ, the services due by a son, a freedman, or a slave.

Optio, a choice, right of selection.

Ordinarii, slaves who had others (*vicarii*) set under them, as a portion of their peculium.

Ordo, see *Discussio*.

Pactio (*nuda*), a mere verbal contract involving no action. Book II. Tit. 22.

Partiarius (*legatarius*), a legatee inheriting a portion of a *hæreditas*. Book II. Tit. 20.

Pater-familias, "the head of a family." For his rights and power see Book I. Tit. 8.

Patrimonium, the right of private possession enjoyed by a *pater-familias*. Book II. Tit. 1.

Patrimonii res, property held under that right.

Patronus, the liberator of a freedman, the protector of a client.

Patrueles, "cousins," being the children of two brothers.

Peculium, the private property or perquisite, which a slave or a son enjoys or has entrusted to him, and is distinct from the common *patrimonium*. Book II. Tit. 9.

Pensio, "rent;" annual payment for land held under a lease for ever, see *Canon*.

Perduellis, "high treason."

Peregrini, "strangers, foreigners," the natives of the provinces. They were of two classes, *socii* and *dediticii* the former enjoying *Jus Italicum* (which the natives of Italy had before the social war), and the latter holding the same rank as conquered enemies.

Persona, "a character on the stage;" personality or individuality recognised by law. Book I. Tit. 3.

Petitio, "a claim or demand" made according to law.

Pignus, "a pledge" given as a security to a creditor, or the contract by which he was bound to restore it when paid. Book III. Tit. 14.

Plagiarius, one who seized, or sold, or imprisoned another unlawfully, "a kidnapper." Book VI. Tit. 18.

Plebiscitum, see Introduction.

Plus-petitio, a demand for more than one is entitled to, either as to quantity, time, or place. Book III. Tit. 6.

Pœnæ nomine, "by way of penalty;" a phrase applied to a legacy to which an obligation was attached.

Possessio, "ownership" involving the actual hold of a thing, and the intention of keeping it. For the various modes in which it was acquired, see Book II. Tit. 1. 9. 13. Book III. Tit. 1. 9.

Possessor bonâ fide, one who has acquired honestly, but on an unsound title. Book II. Tit. 1.

Postliminium, "a return" from exile or captivity, and restitution of all civic rights. This privilege (*jus postliminii*) was a legal fiction, by which the interval of captivity or exile was ignored. Book I. Tit. 12.

Postulare, to state a case before a magistrate.

Postulatio judicis, "a call for a judge," *i. e.* a demand for a trial. Book IV. Tit. 6.

Posthumi, children born after a father's death. For the different classes of, see Book II. Tit. 20.

Potestas, "power, authority:" as, *patria potestas*, that of a father; *dominica*, that of a master. Book I. Tit. 8.

Prædes, "bail, sureties," in pecuniary obligations.

Prædium, "a tenement, or holding" of lands, houses, premises, &c.

Præfectus urbi, "the warden of the city;" a civil magistrate whose jurisdiction extended 100 miles round the city.

Præjudicium, "a preliminary inquiry," upon the result of which an action might be founded. Book IV. Tit. 6.

Prænomen, see *Agnomen*.

Præpostere, "preposterously;" *i. e.* with an inversion of the order of time. Book III Tit. 19.

Præscriptio, "prescription," the right established by usage or duration; *longi temporis*, of ten years; *longissimi temporis*, of thirty, or of forty years. Book II. Tit. 6.

Præses, a governor of a subdivision of a province, under the arrangement of Diocletian. This magistrate acted as a judge in civil and criminal cases.

Præstare, to perform a service, to fulfil an obligation.

Prætexta (toga), "the bordered toga" worn by minors and some magistrates.

Precarium, a contract under which the use or enjoyment of anything was revocable at pleasure.

Procinctus, "an army in order of battle." Book II. Tit. 10.

Procurator, "an agent," or "representative," appointed without the formalities used in the case of a *cognitor*.

Prodigus, "a spendthrift," disqualified by law from the management of his own affairs.

Puberes, persons of the age of maturity, which was supposed to be 14 for males, and 12 for females. *Pubertas plena* was the age of 18.

Pupillus, a minor or ward under the care of a guardian.

Purus locus, "transferable ground;" *i. e.* neither *sacer*, *sanctus*, nor *religiosus*. Book II. Tit. 1.

Quadrupli, "four-fold," see *Dupli*.

Quarta (pars), the fourth portion of an inheritance, which the heir

might appropriate, secured by the *Lex Falcidia*; or the fourth part secured to a *filius adrogatus* by the Law of Antoninus; or the fourth part of what he would have claimed in case of intestacy, secured by the Civil Law, and thence called quarta *legitima*. See Book I. Tit. 11. Book II. Tit. 18. 22.

Quasi, "as if;" a phrase implying an analogy between other cases and those provided for in the law: as, *quasi-possessio*, *quasi ex contractu*, &c.

Quiritium (*dominium ex jure*), ownership acquired under the forms of the civil law, called *Quiritarian* as distinguished from the *Prætorian* or *bonitarian*, which was protected by the prætor.

Rapina, "robbery," theft committed with violence. Book IV. Tit. 2.

Recuperator, a *judex* or juror.

Relegatio, a form of banishment, not involving *capitis diminutio*.

Rem pupilli salvam fore, "that the minor's property shall be safe;" the form of contract to be made by a guardian.

Rei speratæ emptio, "the purchase of a thing expected;" *i. e.* of a thing not yet in the possession of the vendor.

Replicatio, "a rejoinder" or "reply" to an *exceptio*. Book IV. Tit. 14.

Repræsentatio, an immediate and unconditional payment or transfer.

Repudium, "a divorce."

Res perit domino, "the loss is to the owner;" a rule signifying that when things are lost or destroyed, the real owner has no remedy against any intermediate party.

Restitutio in integrum, "a restoration to one's original position;" a privilege by which minors were protected from the consequences of imprudent acts.

Reus, a person against whom an action or claim lies; or who is liable to any obligation, such as a contract, or a vow. The several parties to a stipulation were called *rei*. Book III. Tit. 16.

Sacramentum, a sum deposited as a wager by each of the parties to a suit. Book IV. Tit. 6.

Satisdatio, "security;" the sort of *cautio* given by debtors, and generally by guardians. Book I. Tit. 24.

Semestria, the laws and law-precedents established by the Emperors, during the half of every year which they were supposed to devote to the administration of justice and to legislation.

Senatúsconsulta, see Introduction. They were generally the

guished by the names of their several proposers: as, *SC. Pegasianum; SC. Orphitianum;* &c.

Separatio bonorum, a privilege granted for the protection of the heirs of insolvents, by which their personal properties were kept distinct from the inheritances. Book II. Tit. 19.

Sequestratio, a sort of wager or deposit, which two parties placed in the hands of a third (*sequester*).

Servitutes, liabilities of certain properties to be used in certain ways, by parties not the owners. Book II. Tit. 3.

Servus, "a slave." For the various conditions of slavery, see Book I. Tit. 3.

Sextans, two *unciæ*, or two-twelfths or one sixth of an *as*.

Sobrini, "second cousins;" the children of *consobrini*.

Societas, "partnership;" the contract between partners. For the different kinds of, see Book II. Tit. 25.

Solutio, "payment;" the performance of an obligation. Book III. Tit. 29.

Species, specific things which cannot be represented or replaced by others; distinguished from *genera*, which can be replaced by others: for instance, the Venus of Cnidos, and the helmet of Attila, are *species*; ten horses, and a hundred sheep, are *genera*.

Specificatio, "the creation of *species*;" the act of transforming a raw material into a new substance. Book II. Tit. 1.

Spei emptio, "the purchase of a chance;" as when a man buys the result of a day's hunting beforehand.

Sponsalia, "promises of marriage;" under the Roman law, they involved no action.

Sponsor, "a surety" in a *stipulatio*, synonymous with *fide-promissor*.

Status, literally, "an attitude;" the rank, dignity, or position of a citizen. Book I. Tit. 16.

Statu-liber, a slave liberated conditionally by will.

Stillicidium, the falling of rain from a roof, or the place where it falls. Book II. Tit. 3.

Stipendiarii. See *agri*.

Stipulari, to receive a promise, to enter into a contract.

Stipulatio, a form of making contracts by question and answer. For the several kinds of, see Book III. Tit. 15.

Stirpes, the several lines, or collateral branches of a family. Book III. Tit. 1.

Subsidiaria (actio), an action against a magistrate for neglect of duty. Book I. Tit. 25.

Substitutio, the conditional appointment of an heir. For the various kinds, see Book II. Tit. 15.

Successor, synonymous with *hæres* who succeeded to the rights and liabilities of the testator.

Sui hæres, a member of the *familia* of the testator appointed his successor; they were called *hæredes sui*, "heirs to their own," because during his life they were regarded as joint-proprietors.

Sui juris, "in one's own power;" not subject to the potestas of *another*.

Superficies, property on "the surface" of the land.

Syngrapha, an agreement signed by the two parties.

Tabularius, "a notary;" one who draws out formal documents.

Tabulæ, an account-book, a ledger; *tabulæ nuptiales*, a registry of a marriage.

Taxatio, the limitation of a penalty.

Testamentum, "a will." For the several forms and kinds, see Book II. Tit. 10. For the invalidity of, see Book II. Tit. 17.

Testamenti-factio, that relation between two parties which enabled one to make the other his heir.

Titulus justus, "a clear title;" the combination of circumstances necessary to legalise possession. Book II. Tit. 6.

Traditio, "delivery;" transfer of property. Book II. Tit. 1.

Transcripito nominis, "substitution of name;" *i. e.* of one debtor or security for another; a sort of *novatio*.

Tributarii, see *Agri*.

Tripli, "three-fold."

Turpitudo, a loss of character, lighter than *infamia*, affecting *existimatio*.

Tutela, "guardianship;" the control imposed by law upon one who cannot, because of his youth, &c., take care of himself.

Tutor, "a guardian." For the laws relating to, see Book I. Tit. 19. 20.

Usufructus, the right of using and enjoying (*usus et fructus*) the property of another, without injuring, or altering the substance of it. Book II. Tit. 4.

Usufructuarius, the person enjoying that right.

Usucapio, synonymous with *præscriptio*, a right or title acquired by uninterrupted duration. Book II. Tit. 6.

Usurpatio, an interruption of *usucapio*.

Utendi jus, the right to use without enjoying the produce; differing from *usufructus*, which included both.

Uterini, children of the same mother.

Vacantia bona, "unclaimed property" of persons dying without successors. Book II. Tit. 6.

Vadimonium, the security or recognizances given by litigant parties, to appear in court.

Vades, the sureties in a *vadimonium*. Book IV. Tit 6.

Venditio, "a sale;" see Book III. Tit. 23.

Vectigales agri, uncultivated lands belonging to the state.

Verna, the child of a female slave, and therefore the property of her master; a slave by birth. Book I. Tit. 3.

Via, the right of way; a species of *servitus*.

Vi bonorum raptorum (*actio de*), the action which lay against (*raptores*) persons guilty of *rapina*.

Vindex, synonymous with *defensor*.

Vindicta, the figurative ceremony by which a slave was manumitted Book I. Tit. 5.

Vindicare, "to claim, to assert a right, to demand possession or liberation."

Vitiosæ res, things not transferable, not acquirable, nor alienable. Book II. Tit. 6.

Vitium, irregularity, informality of a document, proceeding, &c.

Vocatio in jus, "a summons to court," the first step in a suit. Book IV. Tit. 6.

Voluntas contraria, a mutual agreement to annul a former agreement. Book III. Tit. 29.

THE END.

LONDON:
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A CATALOGUE

OF

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IN GENERAL LITERATURE,

PUBLISHED BY

LONGMAN, BROWN, GREEN, AND LONGMANS,

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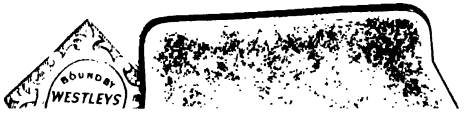
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